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In The

Supreme Court of the United States

PCS NITROGEN FERTILIZER, L.P.,

Petitioner,

versus

SHAW CONSTRUCTORS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

EUGENE R. PREAUS
EDWARD C. GLEASON
PREAUS, RODDY & ASSOCIATES, L.L.P.
650 Poydras Street – Suite 1650
New Orleans, Louisiana 70130
Telephone: (504) 523-2111

MICHAEL R. FONTHAM
Counsel of Record
JASON M. BILBE
SARAH H. BARCELLONA
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Petitioner, PCS Nitrogen Fertilizer, L.P.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a federal court in a diversity case interprets the law of a civil law state under *Erie Railroad Co. v. Tompkins*, may it deviate from the *Erie* protocol and disregard the state's controlling case law in favor of its own interpretation of broad civil law principles, on the theory that a civil law court would look primarily to legislation rather than case law?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following entities are also parties in the proceeding below: ICF Kaiser Engineers, Inc. and Henry J. Kaiser Company. Respondent Shaw Constructors, Inc. was formerly known as United Crafts, Inc., A Shaw Group Company.

Pursuant to Supreme Court Rule 29.6, Petitioner PCS Nitrogen Fertilizer, L.P. submits that the following entities hold a general partnership and/or limited partnership interest in Petitioner: PCS Nitrogen Fertilizer Operations, Inc. (1.01% general partnership interest in Petitioner); and PCS L.P., Inc. (29.9899% limited partnership interest in Petitioner, and a 69% general partnership interest in Petitioner). In turn, PCS Nitrogen, Inc. has a 100% interest in PCS Nitrogen Fertilizer Operations, Inc., as well as a 100% interest in PCS L.P., Inc. Phosphate Holding Company, Inc. has a 100% interest in PCS Nitrogen, Inc. Potash Holding Company, Inc. has a 100% interest in Phosphate Holding Company, Inc. In turn, 609430 Saskatchewan Ltd. has a 20% interest in Potash Holding Company, Inc., while Potash Corporation of Saskatchewan Inc. has a 100% interest in 609430 Saskatchewan Ltd. and an 80% interest in Potash Holding Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

PCS Nitrogen Fertilizer, L.P. ("PCS"), petitioner, hereby petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, reversing the decision of that court to adopt the "civil law" method of analysis in deciding an issue of Louisiana law, in which the court of appeals adopted its own view of the meaning of legislative enactments and provided no deference to the authoritative determinations of state courts on the issues before the court of appeals.

OPINIONS BELOW

The Opinion and Order of the court of appeals is reported at 395 F.3d 533 (5th Cir. 2005). [App. 1-41]. The opinion of the United States Magistrate Court, which sits in the Middle District of Louisiana and decided the issues by consent, is reported at 192 F. Supp. 2d 545 (M.D. La. 2001). [App. 42-63].

JURISDICTION

This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254. The petition seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit entered December 30, 2004. [App. 1-41]. Upon motion by PCS Nitrogen Fertilizer, L.P. ("PCS"), petitioner, the court of appeals on January 12, 2005 extended the time for filing a petition for rehearing. [App. 64]. PCS timely filed petitions for rehearing and rehearing

en banc on January 27, 2005. The petitions were denied on February 16, 2005. [App. 65-66].

STATUTORY PROVISIONS

The Rules of Decision Act, 28 U.S.C. § 1652, provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The following Louisiana Civil Code articles, reprinted at App. 67-70, are involved in this case:

La. C.C. art. 1979
La. C.C. art. 1982
La. C.C. art. 2005
La. C.C. art. 2015
La. C.C. art. 2016

The following provisions of the Louisiana Public Works Act are also involved and are reprinted at App. 71-76:

La. R.S. 9:4802
La. R.S. 9:4807

STATEMENT OF THE CASE

1. ***Introduction***. This case presents an extreme departure by a federal court of appeals from the protocol for determining issues of state law established under this Court's decisions. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and subsequent cases, a federal court applying state law in a

diversity case must follow the decisions of state courts unless persuasive data indicates that the state's highest court would change the existing rule. Contrary to the *Erie* methodology, the United States Court of Appeals for the Fifth Circuit ("court of appeals") declined to follow state case law and nullified Louisiana's rule permitting parties to limit remedies for breach of contract.

Adopting the so-called "civil law metho[d]" for resolving cases, the court of appeals looked to "legislative enactments" and "custom" rather than "prior decisions of the courts," and adopted its own view of the best interpretation of the legislation. [App. 23, 24 & n.51]. A long line of state court cases upholds contract provisions like the lien waiver involved in this case, but the court of appeals in a footnote dismissed them peremptorily. Further, it did not even acknowledge a recent state appellate court decision rejecting the same legislative interpretation that the court of appeals adopted. [App. 27-28 n.57]. This approach goes beyond erring on a state law question; it breaches the *Erie* rule requiring that federal courts respect state court determinations on matters of state law.

The court of appeals' decision creates a different *Erie* methodology for interpreting Louisiana law as compared to the law of other states, which conflicts with the principles underlying *Erie*. It effectively negates limitation-of-remedies provisions in diversity cases involving Louisiana law, although these provisions are fully enforceable in state court. Thus, it creates dual legal rules for limitation-of-remedies cases and will promote forum shopping. The court's peremptory abrogation of the rule announced by the state courts breaches federal-state comity and necessitates review in this Court.

2. ***Statement of facts and proceedings***. PCS Nitrogen Fertilizer, L.P. ("PCS"), petitioner, entered a $38 million contract for the construction of a nitric acid production facility with ICF Kaiser Engineering, Inc. ("Kaiser"). PCS and Kaiser agreed that Kaiser would deliver the project free and clear of liens. In turn, Kaiser entered a subcontract with the predecessor of Shaw Constructors, Inc. ("Shaw"), respondent, for a portion of the work. In the subcontract, Shaw provided an unequivocal lien waiver in favor of the owner: "Subcontractor hereby agrees to and does waive his right to file any mechanic's liens or claims of any sort or kind against Owner's premises or any part thereof." [App. 82]. PCS paid Kaiser amounts due under the contract, but Kaiser did not pay the full amount due Shaw under the subcontract.

When Kaiser failed to make timely payment of the outstanding sum, Shaw filed liens against PCS's property. These lien affidavits were filed to preserve Shaw's claim to the "unpaid balance" under "the terms of the subcontract." [App. 96]. Shaw also filed suit in Louisiana state court against Kaiser and PCS seeking the amounts "due and payable under the subcontract." [App. 101]. The suit was removed to the United States District Court for the Middle District of Louisiana ("district court"). [App. 5, 46]. The district court had jurisdiction over the case pursuant to 28 U.S.C. § 1332, as diversity of citizenship existed between Shaw and each defendant and the amount in controversy was more than $75,000.

Shaw filed a motion for partial summary judgment seeking recognition of a lien against PCS's property, and PCS filed a motion for partial summary judgment seeking to dismiss Shaw's demands. The parties consented to adjudication before a Magistrate Judge. [App. 6]. The

Magistrate Court ruled that the provision waiving the lien remedy as to the owner was enforceable even though Kaiser breached the underlying contract: "Interpreting article 1982 as suggested by Shaw . . . would negate the right of PCS under articles 1978 and 1981 to accept and demand performance of the *stipulation pour autrui*." [App. 59]. With regard to the argument that Kaiser's breach rendered the limitation-of-remedies clause unenforceable, the Magistrate Court noted: "Shaw cites no authority or persuasive arguments to support such a result." [*Id*]. Shaw, which sought to enforce the subcontract, did not argue to the Magistrate Court that the subcontract had been dissolved.

On appeal, Shaw argued primarily that PCS was not a third-party beneficiary to the subcontract. [App. 113]. It also contended that the breach rendered the third-party stipulation unenforceable, an argument that conflicts with the Louisiana cases. [Par. Nos. 11-13 *infra*]. Shaw made only a passing reference to a supposed right to dissolve the contract in a reply brief. [App. 115-16].

The court of appeals upheld the Magistrate Court's determination that PCS was intended as a third-party beneficiary of the lien waiver in the subcontract, but held that Shaw had a right to dissolve the subcontract and render the waiver unenforceable. In reaching this conclusion, the court of appeals asserted the prerogative to engage in its own analysis of civil law and other legislative principles rather than follow case law. The opinion, authored by a former Louisiana Supreme Court Justice, relied on an interpretation of broad Louisiana Civil Code articles, "as we think the Louisiana Supreme Court would. . . ." [App. 10-30, 12, 21]. Indeed, in distinguishing

an Illinois case, the court made it clear that it considered *any* case law unimportant in reaching its conclusion:

> In Louisiana, "[t]he sources of law are legislation and custom." These authoritative or primary sources of law are to be "contrasted with persuasive or secondary sources of law, such as [Louisiana and other civil law] jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom." "It is axiomatic that in Louisiana, courts must begin every legal analysis by examining primary sources of law: the State's Constitution, codes and statutes." "Our ultimate '*Erie* guess' requires that we employ the appropriate Louisiana methodology to decide this issue the way that we believe the Supreme Court of Louisiana would decide it." . . .

[App. at 23-24. (brackets in original) (footnotes omitted)]. The court of appeals cited a Louisiana law review article as describing the appropriate method of analysis for Louisiana state court judges: "The Louisiana judge must, as stated, find primarily in legislative enactments the legal principles to be applied in deciding the case before him" as opposed to "'prior decisions of the courts.'" [App. 24 n.51, quoting Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727, 727-28 (1962)].

True to this approach, and contrary to *Erie's* requirement to respect on-point case law, the court of appeals engaged in a lengthy discussion of broad Louisiana civil law provisions, treatises and articles as a basis for declaring the lien waiver unenforceable. [App. 14-30]. The court's review of these provisions led it to the conclusion that Shaw could avoid enforcement of the lien waiver by

"dissolving" its subcontract with Kaiser, although Shaw never sought to dissolve the subcontract and indeed brought this suit to *enforce* payment for the subcontract price. [*Id.*]. Specifically, the court of appeals determined that when Kaiser failed to pay the entire amount due under the subcontract, Shaw had the right under Louisiana Civil Code Article 2016 to consider the subcontract "dissolved" and free itself from the clause limiting remedies. [App. 14-22]. It said: "PCS is amenable to Shaw's defense and the right of dissolution just as Kaiser would have been if it had sought to enforce the lien waiver provision." [App. 22].

The court of appeals in the text of its opinion on the lien waiver issue did not discuss *any* of the Louisiana cases upholding and enforcing provisions limiting remedies upon breach of contract. [App. 1-41; Par. Nos. 11-13 *infra*]. It swept aside the many cases upholding lien waivers in favor of owners, as third-party beneficiaries, in a conclusory footnote. [App. 27-28 n.57; Par. No. 11 *infra*]. The court did not discuss a recent Louisiana appellate court decision, review of which was denied by the Louisiana Supreme Court, that rejected the same contract dissolution theory adopted by the court of appeals. *Mobil Exploration & Producing U.S., Inc. v. Certain Underwriters*, 2001-2219 (La. App. 1 Cir. 11/20/02), 837 So. 2d 11, 31, *writ denied*, 2003-0418 (La. 4/21/03), 841 So. 2d 805 (La. C.C. art. 2016 does not permit a party to avoid its own agreement limiting remedies for breach by dissolving contract) [Par. No. 12 *infra*]. The court discussed only one Louisiana case, not cited in the brief of either party, dealing generally with the circumstances under which a party is deemed to have waived the right to dissolve a contract. [App. 18-20].

PCS applied for rehearing and rehearing *en banc*. The Louisiana Chemical Association and the Louisiana Pulp and Paper Association filed a brief of *amicus curiae* supporting the petitions for rehearing, asserting that the consequences of the court's erroneous determination of state law could be "staggering" for their members – many of which are out-of-state corporations. [App. 119]. The court of appeals denied the petitions on February 16, 2005. [App. 65-66].

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals adopts a different methodology for determining state law in Louisiana diversity cases than the method prescribed by this Court in *Erie* and subsequent rulings. Under this Court's decisions interpreting the Rules of Decision Act, a federal court must apply the holdings of state courts in determining state law unless persuasive data indicates that the highest court of the state would overrule these decisions. In this case, the court of appeals indicated that it was not required to give deference to state court decisions and brushed aside or ignored on-point state court rulings. [App. 23-24]. The court of appeals declared itself free, in determining issues of Louisiana law, to make its own interpretation of "legislation and custom" in deciding what *ought to be* the law of Louisiana. [*Id.*]. This approach permits two rules of decision – one applicable in federal courts and the other in state courts – when interpretations are made of Louisiana law. The court's special "civil law metho[d]" conflicts directly with this Court's prescribed approach to determining state law issues and the principles underlying *Erie*. [App. 23].

1. The Rules of Decision Act, 28 U.S.C. § 1652, commands federal courts to regard as "rules of decision" the substantive "laws" of the appropriate state, except where the federal constitution, treaties, or statutes provide otherwise. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court held that the state "laws" referenced in the Rules of Decision Act included not only state statutes, but also the "laws" as interpreted by state supreme courts. The Court overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842), which held that federal judges in determining state law were not bound to follow the decisions of state courts, but were free "to exercise an independent judgment as to what the common law of the State is – or should be. . . . " *Erie*, 304 U.S. at 71, 58 S. Ct. at 819, 82 L. Ed. at 1190. The Court in *Erie* determined that state law can exist only through the declarations of state organs – the legislature and the courts – and the federal courts' exercise of independent judgment as to matters of state law "invaded rights which in our opinion are reserved by the Constitution to the several States." *Id.* at 80, 58 S. Ct. at 823, 82 L. Ed. at 1195.

2. Subsequent to *Erie*, this Court issued a series of decisions requiring federal courts generally to follow decisions of lower state courts. The Court held that where a lower state court had ruled on an issue, but the state's supreme court had not addressed the issue, a federal court must adhere to the lower court's state law interpretation in the absence of persuasive data indicating that the state supreme court would decide the matter differently. In *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237-38, 61 S. Ct. 179, 183-84; 85 L. Ed. 139, 144-45 (1940), the Court held:

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. . . . Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the [appellate court] case, whether that will ever happen remains a matter of conjecture.

The Court went even further in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940), *reh'g denied*, 311 U.S. 730, 85 L. Ed. 475, 61 S. Ct. 176 (1941). In *Fidelity*, the Court held that federal courts were bound by the decisions of vice-chancellors from the New Jersey Court of Chancery: "An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Id.* at 177-78, 61 S. Ct. at 178, 85 L. Ed. at 113.

3. These decisions have dictated the method for determining state law under the Rules of Decision Act for more than 60 years. The federal courts are not inextricably *bound* by state court decisions, but they must give deference to these decisions and follow them unless persuasive data indicates the decisions would be overruled. *Hicks v. Feiock*, 485 U.S. 624, 629-30, 108 S. Ct. 1423, 1428, 99 L. Ed. 2d 721, 730 (1988) (where state Supreme Court denied review of state appellate court decision, that decision should be treated as determinative of state law); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 57-58 (2d Cir. 2004) (federal court defers to state appellate court decision

absent persuasive data that state's highest court would adopt different rule); *Neurotron, Inc. v. Medical Service Ass'n*, 254 F.3d 444, 448 (3d Cir. 2001) (same); *CPC International, Inc. v. Northbrook Excess & Surplus Insur.*, 962 F.2d 77 (1st Cir. 1992) (federal district court did not have sufficient data to depart from rule of state law as announced by state intermediate appellate court). These decisions do not permit a federal court to exercise its independent judgment in interpreting state law, without at least confronting conflicting state rulings and explaining the basis on which the court believes the state would change its existing rule.

4. The court of appeals viewed its *Erie* duty differently for cases in which Louisiana law applies than for cases involving the law of other states. The court declared itself free to "employ the appropriate Louisiana methodology" and "'find primarily in legislative enactments the legal principles to be applied in deciding the case. . . .'" [App. 24 & n.51]. According to the court of appeals, the Louisiana Supreme Court if it addressed the issue would look not to the case law, but to the broad principles contained in "the Louisiana Civil Code and the [Louisiana Public Works Act]." [App. 24]. Thus, the court of appeals authorized itself to engage in a broad discussion of Louisiana Civil Code principles and dismiss or ignore on-point case law. [App. 24, 22-30]. The court created a unique *Erie* method of analysis for Louisiana cases, different from the methodology dictated by this Court. In effect, the court authorized itself to interpret Louisiana legislation *de novo*, without following the interpretation deemed appropriate by Louisiana courts in a long line of cases. [*See* Par. Nos. 11-13 *infra*].

5. The court of appeals' view of the civil law methodology employed in state courts does not justify the dismissal of state case law in favor of a different interpretation of legislation deemed more correct by a federal court. This principle was established in *Erie* and made explicit in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940), and *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940). In *Fidelity Union Trust*, this Court determined that a federal court could not adopt its own view of the proper interpretation of a statute in the face of a conflicting interpretation by state courts. 311 U.S. at 178, 61 S. Ct. at 177, 85 L. Ed. at 112. It said: "An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Id.* at 177-78; 61 S. Ct. at 178, 85 L. Ed. at 113. Further, the Court determined that the avoidance of conflicting federal and state interpretations of state legislation "has practical aspects of great importance in the proper administration of justice in the federal courts." *Id.* at 179-80, 61 S. Ct. at 179, 85 L. Ed. at 114. The Court said:

> It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. In the absence of any contrary showing, the rule of the *Thatcher* and *Travers* cases appears to be the one which would be applied in litigation in the state

> court, and whether believed to be sound or unsound, it should have been followed by the Circuit Court of Appeals.

Id. at 180, 61 S. Ct. at 179, 85 L. Ed. at 114.

6. Further, the approach in which federal judges attempt to discern the meaning of state legislation without resort to the Louisiana case law cannot be squared with the fundamental principle underlying *Erie*. In that case, the Court quoted a prior dissenting opinion of Mr. Justice Holmes for the proposition that there is no "'transcendental body of law'" that may be implanted upon a state because state law must have "some definite authority behind it," and "the authority and only authority is the State. . . ." *Erie*, 304 U.S. at 79, 58 S. Ct. at 823, 82 L. Ed. at 1195, *citing Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72, 30 S. Ct. 140, 147-48, 54 L. Ed. 228, 238-39 (1910). Further, in *West v. American Tel. & Tel. Co.*, the Court held that the law as declared by state intermediate courts is the law of the state and must be followed absent "persuasive data" indicating the rule will be changed. 311 U.S. at 237, 61 S. Ct. at 183, 85 L. Ed. at 144. It said:

> There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. . . .

311 U.S. at 236-37, 61 S. Ct. at 183, 85 L. Ed. at 144.

7. The existence of a so-called "civil law metho[d]" in Louisiana does not change the requirement to respect state court decisions. [App. 23]. Louisiana state judges use the "civil law method" in reaching their decisions, and their rulings have the authority of the state behind them. The Louisiana state courts have held, without discord, that lien waivers are enforceable, and a Louisiana appellate court rejected the theory that contract "dissolution" may abrogate a limitation-of-remedies clause. [Par. Nos. 11-13, *infra*]. A federal court's differing view of the proper interpretation of state legislation is an insufficient basis for declaring the state law to be different, regardless of the method of legal analysis employed in the state.

8. The creation of a new *Erie* methodology for Louisiana also is not justified by the civilian method of analysis. The court of appeals' opinion overstates the degree to which Louisiana judges may disregard case law. Louisiana courts follow and apply precedents in much the same fashion as common law courts. The Louisiana Supreme Court explained that doctrine of *jurisprudence constante* in *Johnson v. St. Paul Mercury Insurance Co.*, 236 So. 2d 216 (La. 1970), where it overturned an appellate court for failing to follow "the settled law of this State." *Id.* at 217. The court said:

> Fundamental and elementary principles recognize that certainty and constancy of the law are indispensable to orderly social intercourse, a sound economic climate and a stable government. Certainty is a supreme value in the civil law system to which we are heirs. In Louisiana, courts are not bound by the doctrine of *stare decisis*, but there is a recognition in this State of the doctrine of *jurisprudence constante*. Unlike *stare decisis*, this latter doctrine does not contemplate

> adherence to a principle of law announced and applied on a single occasion in the past.
>
> However, when, by repeated decisions in a long line of cases, a rule of law has been accepted and applied by the courts, these adjudications assume the dignity of *jurisprudence constante*; and the rule of law upon which they are based is entitled to great weight in subsequent decisions.
>
> Thus, while this court has the power to modify and overrule its former decisions, it does not do so unless it is clearly demonstrated that error has occurred and hardship and injustice will attend a continuation of the rule of law.

Id. at 218-19. Louisiana judges routinely treat precedent in much the same fashion as common law courts: they follow the decisions of higher courts and their own courts and treat the decisions of other courts as persuasive. [*See* La. S. Ct. R. X(a)(1) (basis for writ application is a conflict with "a decision of another court of appeal, this court, or the Supreme Court of the United States, on the same legal issue.")]. Louisiana courts may look to legislative principles rather than analogous case law *when there is no case law on a point*, but they do not look to legislative principles in lieu of applicable precedents.

9. A federal court's different interpretation of legislation does not constitute the "persuasive data" required to depart from a body of Louisiana case law. The court must determine that objective developments – an intervening statute, an intervening and contrary decision of the state's highest court on an analogous point, or dicta from the state's highest court suggesting a shift in the majority opinion – will bring about a change in the law. *See, e.g., Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003

(4th Cir. 1998); 17A MOORE'S FEDERAL PRACTICE § 124.20[2] (2005). When the state's highest court has denied review of an intermediate court decision on a point, the denial of review at least constitutes persuasive evidence that the ruling accurately represents the state's law. *See Hicks v. Feiock*, 485 U.S. 624, 629-30, 108 S. Ct. 1423, 1428, 99 L. Ed. 2d 721, 730 (1988) ("Although petitioner marshals a number of sources in support of the contention that the state appellate court misapplied state law on these two points, the California Supreme Court denied review of this case, and we are not free in this situation to overturn the state court's conclusions of state law."). Here, an entire body of law has developed in Louisiana upholding the validity of lien waivers. [Par. No. 11 *infra*]. Moreover, the statutory "dissolution" theory adopted by the court of appeals was rejected by a state intermediate court and review was denied by the Louisiana Supreme Court only two years ago. [Par. No. 12 *infra*].

10. Additionally, the court of appeals' approach is out of step with the approaches used by other circuits in interpreting Civil Codes. As in all jurisdictions when a statute provides a governing principle, the courts consider the statute, but they look to local case law to determine the application of the statute to facts. Thus, the First Circuit looks to the case law of Puerto Rico in determining the proper interpretation of the Civil Code of Puerto Rico. *See, e.g., Hector Emilio Reyes-Cardono v. J. C. Penney Co., Inc.*, 694 F.2d 894, 896-97 (1st Cir. 1982); *See also*, Stephen G. Breyer, *The Relationship Between the Federal Courts and the Puerto Rico Legal System*, 53 REV. JUR. U.P.R. 307, 310 (1984) (law of Puerto Rico is law enunciated by its Supreme Court, using civil law methods). Indeed, with respect to the civil law of Puerto Rico, this

Court has determined that federal courts must respect the determinations of local courts under Puerto Rican law. *De Castro v. Board of Commissioners of San Juan*, 322 U.S. 451, 64 S. Ct. 1121, 88 L. Ed. 1384 (1944). The Court said:

> Nor does it follow that the deference due, on appeals from the local tribunals, to their understanding of matters of local concern will lead to the establishment of a local law differing from that developed in decisions in appeals from the federal district courts sitting in our insular possessions. It is not any the less the duty of the federal courts in cases pending in the federal district court or on appeal from it to defer to that understanding, when it has found expression in the judicial pronouncements of the insular courts. Once understood what deference is to be paid, the problem is comparable to that presented when, upon appeals from federal district courts sitting in the states, the federal appellate courts are required to follow state law under the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64.

Id. at 459, 64 S. Ct. at 1125, 88 L. Ed. at 1392-93 (citations omitted). Additionally, in *Reliance Finance Corp. v. Miller*, 557 F.2d 674 (9th Cir. 1977), the Ninth Circuit used case law to discern the proper interpretation of a California Civil Code provision permitting contract rescission on the basis of mistake: "California case law suggests that there is more to the law of mistake than might be apparent from the simple language of these statutes." *Id.* at 679.

11. The court of appeals adopted an interpretation of civil law principles that flatly conflicts with Louisiana case law. The court of appeals dismissed in a conclusory footnote a line of Louisiana authority holding that a party *may waive* a lien against a third-party owner's property as

part of a contract; additionally, these cases hold that the waiver may be enforced by the third-party owner even if the other party to the contract breaches it. [App. 27-28 & n.57]. The Louisiana Supreme Court established this principle in *Toomer v. Price*, 122 So. 856 (1929). In *Toomer*, a surety provided a bond guaranteeing completion of a job on the condition that a lumber supplier waive its right to file a lien against the owner's property in the event of a breach by the contractor. The lumber supplier provided the lien waiver, but filed a lien after the contractor failed to pay the price due for the lumber. The court determined that the contractor's breach did not negate the lien waiver, which protected the surety as guarantor of the job as well as the owner. Although the applicable statute provided that a surety could raise only those defenses that could be raised by the contractor, the court determined that the lumber supplier could agree to dispense with that limitation. It said:

> It is true that [the applicable statute] declares that the surety on a contractor's bond shall be allowed to make only such defense as the contractor is authorized to make; but that is a provision in the law which any party for whose interest it is made may dispense with; and the lumber company did dispense with it by the letter guaranteeing that no lien would be recorded for the company's claim, which was the same as to say that, if the contractor should default on his contract, the surety company would not be liable for the lumber furnished by the lumber company.

Id. at 857. This ruling conflicts directly with the court of appeals' decision that Shaw could not be bound by its agreement to dispense with the lien remedy.

A series of Louisiana appellate court decisions have applied the rule permitting lien waivers in favor of owners as third-party beneficiaries. In *Executive Office Centers, Inc. v. Cournoyer*, 433 So. 2d 324 (La. App. 4th Cir. 1983), the court held that lien waivers are valid in Louisiana. In that case, Executive claimed that Cournoyer had violated a mortgage by entering into contracts in excess of $15,000 that could result in liens being filed against the subject property. The court held this argument unavailing because Cournoyer obtained lien waivers from those with whom he contracted. It said:

> Even assuming there was a contract in excess of $15,000, defendant Cournoyer produced evidence of documents, all contracts, which expressly waived any right to lien the property. The mortgage does not expressly permit or prohibit the employment of such waivers. *The jurisprudence of our state, however, recognizes their validity.* "Liens may be lost in a number of ways: that is, by payment of the claim secured, by waiver expressly agreed to, or by waiver arising by implication from the facts and circumstances of the particular case." . . . Having obtained these lien waivers, Cournoyer cannot have violated the provisions of paragraph 6(d) of the mortgage contract.

Id. at 327 (emphasis added) (citations omitted).

In *Babineaux v. Grisaffi*, 180 So. 2d 888 (La. App. 3d Cir. 1965), the court determined that a garage repairman waived the statutory repairman's lien against the owner's car. The car was involved in an accident and the party at

fault promised to pay for the repairs. The repairman, through his conduct, indicated an intent to look to that party for payment. The repairman sought to enforce the statutory lien when he did not receive his payment. The court said:

> It may be that were it not for the agreement, which we think constituted a waiver by plaintiff of his lien, he would have a privilege for the amount of his repairs. However, under the circumstances, we think plaintiff has waived any right he has to a lien.

Id. at 889. Similarly, in *Wardlaw Bros. Garage, Inc. v. Thomas*, 140 So. 108 (La. App. 2d Cir. 1932), a party who had damaged the owner's vehicle promised to make payment to the garage for repairs. After he failed to make payment, the garage sued the owner on an asserted statutory lien. The court held that the lien would attach absent a waiver. It ruled, however, that the garage waived its lien against the owner. The court said: "In this case, we think the lien and privilege was lost by implication. . . ." *Id.* at 109. *See also, Bank of Jena v. Rowlen*, 370 So. 2d 146, 148 (La. App. 3d Cir. 1979) ("While it appears that a materialman's lien may be waived expressly or by implication where there is a strong factual basis therefor," no waiver was given in the present case).

Additionally, in a case that at least provides analogous support for upholding the lien waiver, the Louisiana Supreme Court upheld a materialman's lien waiver despite a claim of breach. *Hero & Co. v. Farnsworth & Chambers Co.*, 107 So. 2d 650 (La. 1958). In *Hero & Co.*, the Louisiana Supreme Court enforced a waiver of a materialman's lien filed against a lease and the improvements thereon. The materialman entered an agreement

with the contractor to "waive our material lien privilege" on the lease improvement job in exchange for the contractor's agreement to make payments jointly to the subcontractor and the materialman. The contractor withheld part of the payment, but put sufficient funds within the control of the subcontractor and materialman to permit payment to the materialman. The court held that this action not only discharged the contractor, but defeated "the plaintiff's claim for a materialman's lien and privilege" *against the third-party lease owner. Id.* at 656.

The court of appeals noted these cases only in a footnote, asserting generally that they do not support the proposition that Louisiana courts enforce lien waivers when "there has been a failure of cause or consideration or material breach of a commutative contract." [App. 27, n.57]. But lien waivers are intended precisely for the situation where the principal obligor breaches. In this case, the failure of payment is the identical breach as that involved in *Toomer, Babineaux* and *Wardlaw Bros. Garage*. Only by dismissing the cases out of hand, in a footnote, could the court of appeals avoid confronting this difficulty.

12. The theory that a material breach of contract permits dissolution under La. C.C. art. 2016 and obviates a promise to limit remedies conflicts with recent Louisiana jurisprudence that was not even addressed by the court of appeals. The Louisiana First Circuit Court of Appeal recently rejected a claim that dissolution pursuant to Article 2016 could be used to eliminate a waiver of liability for consequential damages and the Louisiana Supreme Court declined to review the decision. *Mobil Exploration & Producing U.S., Inc. v. Certain Underwriters*, No. 2001-2219 (La. App. 1 Cir. 11/20/02); 837 So. 2d 11, 31, *writ*

denied, 2003-0418 (La. 4/21/03), 841 So. 2d 805. In that case, a trial court ruled that Article 2016 of the Louisiana Civil Code – the same provision the court of appeals relied on here – permitted a party to escape a provision limiting damages by dissolving the contract after a breach. [*See* App. 16 & n.26 (court of appeals' opinion)]. The Louisiana court of appeals, however, held: "The trial court mischaracterizes the purpose of La. C.C. art. 2016, which is to relieve an obligor of any further performance under the contract when the obligor has failed to perform." 837 So. 2d at 31. It ruled:

> While La. CC. arts. 2013 et seq. authorize dissolution of a contract for failure of performance and provide for damages in appropriate circumstances, La. C.C. arts. 2005 et seq. provide for instances in which the parties have provided in advance, contractually, for the measure of damages due upon default by one of the parties. The fact that the contract was breached does not render inoperative the contractual provisions governing breach; otherwise that portion of the contract becomes meaningless.

Id. at 31. The Louisiana Supreme Court denied review of that decision only two years ago.

13. Additionally, the court of appeals did not attempt to reconcile its ruling with other Louisiana cases that enforced provisions limiting remedies for breach of contract. *E.g.*, *Louisiana National Leasing Corp. v. ADF Service, Inc.*, 377 So. 2d 92 (La. 1979) (waiver of implied warranty enforced); *Rhodes v. Congregation of St. Francis*, 476 So. 2d 461 (La. App. 1 Cir. 1985) (provision specifying remedy upon breach enforced); *E.M. Freeman v. Dep't of Highways*, 217 So. 2d 166 (La. 1968) (on rehearing)

(upholding no-damages-for-delay clause); *Stone v. Stone*, 292 So. 2d 686, 692 (La. 1974) (enforcing arbitration clause). None of the Louisiana decisions can be reconciled with a rule permitting a party to avoid a contract provision limiting remedies by declaring the contract "dissolved" upon a breach, because provisions governing remedies assume that a party will allege the contract was breached.

14. The decision of the court of appeals has substantial impact. First, in departing from the prescribed *Erie* methodology, the court of appeals "invaded rights which in our opinion are reserved by the Constitution to the several States." *Erie*, 304 U.S. at 80, 58 S. Ct. at 823, 82 L. Ed. at 1195. Second, in creating a different rule of law in federal diversity cases than exists in state court, the court of appeals affects many out-of-state companies, like PCS, that own plants or do business in Louisiana. The parties appearing as *amici* in the court of appeals – the Louisiana Chemical Association and the Louisiana Pulp and Paper Association – asserted that the implications of the court of appeals' ruling could be "staggering" for their members. [App. 119]. Third, the decision unduly infringes upon the rights of parties voluntarily to determine the rules governing economic relations between them. Therefore, the case merits review in this Court.

CONCLUSION

This Court should grant a writ of certiorari to determine whether the court of appeals is free, in Louisiana cases, to depart from the methodology prescribed by this Court for determining state law.

Respectfully submitted,

EUGENE R. PREAUS
EDWARD C. GLEASON
PREAUS, RODDY & ASSOCIATES, L.L.P.
650 Poydras Street – Suite 1650
New Orleans, Louisiana 70130
Telephone: (504) 523-2111

MICHAEL R. FONTHAM
Counsel of Record
JASON M. BILBE
SARAH H. BARCELLONA
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 02-30183

SHAW CONSTRUCTORS,

Plaintiff-Appellant, Cross-Appellee,

VERSUS

ICF KAISER ENGINEERS, INC., ET AL.,

Defendants,

PCS NITROGEN FERTILIZER, L.P.

Defendant-Appellee, Cross-Appellant

Appeals from the United States District Court
For the Middle District of Louisiana

(Filed Dec. 30, 2004)

Before HIGGINBOTHAM, GARZA, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

This is an action based on the Louisiana Private Works Act that requires the interpretation and application of the Louisiana Civil Code articles in the chapters on Third Party Beneficiary and Dissolution of Contracts.

A subcontractor performed its part of the work in constructing a $38 million Nitric Acid Facility for the owner of an industrial plant. In the subcontract with the general contractor, the subcontractor "agrees to and does

waive" its right to file claims or liens against the owner's property. When the general contractor materially breached its primary obligation to pay the subcontractor the $5.3 million balance due for work on the owner's facility, the subcontractor filed claims and privileges or liens against the owner's property and brought suit against the owner under the Louisiana Private Works Act ("LPWA").[1] The owner filed a counter-claim, as third party beneficiary of the subcontract's lien waiver provision, seeking the enforcement of that provision, the cancellation of the claims and liens filed, and the award of damages and attorneys' fees. Applying Louisiana law in this diversity jurisdiction suit, we reverse the magistrate court's holding that the subcontractor may not raise against the owner-third party beneficiary's demand the defenses it could have raised against the general contractor. Instead, we enter summary judgment sustaining the subcontractor's right to regard the subcontract as dissolved and the parties restored to their pre-contract positions when it became evident that the general contractor would not perform and had materially breached the subcontract.[2] Because dissolution and restoration operate retroactively to have effect as of the day the subcontract was entered into, and because the subcontractor did not explicitly waive its right to dissolution, the dissolved lien waiver provision of the rescinded subcontract could not be invoked to preempt or bar the exercise of the subcontractor's right to file claims and liens

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[1] La. R.S. § 9:4801, *et seq.* The subcontractor also brought suit against the general contractor, but these parties entered into a "Compromise Agreement," described more fully herein, reserving the subcontractor's rights against the owner.

[2] *Id.* arts. 2013, 2016, & 2018.

under the LPWA and seek to enforce them against the owner and its property.

I.

On September 17, 1997, PCS Nitrogen Fertilizer, L.P. ("PCS"), owner of an industrial plant near Geismar, Louisiana, entered into a $38 million contract ("Prime Contract") with general contractor ICF Kaiser Engineering, Inc. ("Kaiser") for design and construction of a structure named the "1265 STPD NITRIC ACID FACILITY." The facility was built at the PCS plant straddling the boundary line between Iberville and Ascension Parishes.

Under the Prime Contract, PCS authorized Kaiser to subcontract portions of the work but specified that Kaiser would be responsible for the actions of subcontractors. The Prime Contract also provided that Kaiser would pay and discharge any lien that may be filed, and indemnify, defend, and hold PCS harmless from liens on its property.[3] In addition, the Prime Contract provided that Kaiser would reimburse PCS whatever costs PCS incurred in discharging any liens. Although the LPWA authorized PCS to protect itself against personal liability and privileges on its property under the Act by filing a notice of the contract and having Kaiser file a bond to protect subcontractors,[4] PCS chose not to do so.

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[3] The common law term "lien" and civil law term "privilege" will be used interchangeably throughout this opinion because the parties spoke of the terms as equivalent and as the differences between the terms are not relevant to our analysis.

[4] La. R.S. § 9:4802(C).

In January 1998, Kaiser subcontracted a portion of its work to Shaw Constructors, Inc. ("Shaw").[5] The subcontract states that Shaw agrees to provide labor, equipment, materials, and other construction services for the 1265 STPD NITRIC ACID FACILITY project and "agrees to and does waive its right to file any mechanic's lien or claims of any sort or kind against [PCS's] premises or any part thereof."[6] In exchange, Kaiser obligated itself in the subcontract to make payments to Shaw, based on its monthly progress, within 45 days after receiving each of Shaw's invoices.

As Shaw's work progressed, Kaiser failed to make timely payments, and Shaw contemplated stopping work. Instead, on January 12, 1999, Shaw agreed to continue work in exchange for Kaiser making specifically scheduled payments and obtaining a payment bond for the remainder of the work on the project.

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[5] PCS was not a party to the subcontract, and there was no privity between PCS and Shaw. However, the subcontract between Kaiser and Shaw referred to the Prime Contract between PCS and Kaiser, referred to PCS as "owner," and stated that "Subcontractor hereby agrees to and does waive its right to file any mechanic's lien or claims of any sort or kind against owner's premises or any part thereof."

[6] The full text of the lien waiver clause provides:

> Subcontractor hereby agrees to and does waive its right to file any mechanic's lien or claims of any sort or kind against owner's premises or any part thereof. Subcontractor further agrees to obtain a written waiver of the right to file any mechanic's liens or claims of any sort or kind against Owner's premises or any part thereof from any and all subcontractors, suppliers and materialmen at the time any subcontracts or purchase orders are issued in connection with the work. In accordance with Article 25E of Exhibit "C", General Conditions for Subcontract, a "Release and Waiver of Lien" in the form of Appendix 1-A shall be executed by Subcontractor prior to release of each payment hereunder.

Nevertheless, Kaiser still failed to perform its obligation under the subcontract to pay for Shaw's work. Instead, on January 26, 1999, Kaiser notified Shaw that it could or would not make any further payment under the subcontract. Shaw, which essentially had completed its work, wound up its portion of the project on February 1, 1999. At the time of Kaiser's complete, material breach of the subcontract, it had failed to pay Shaw over $5.2 million for Shaw's construction work on the PCS nitric acid facility. On January 27, 1999, Shaw filed and recorded statements of claim and privilege asserting its rights under the LPWA against PCS and its property for Shaw's uncompensated work on the PCS facility.

On February 23, 1999, Shaw filed suit against PCS and Kaiser in state court in Iberville Parish. PCS and Kaiser removed the case to federal court. On April 8, 1999, Shaw and Kaiser entered into an agreement ("Compromise Agreement") that: (1) Kaiser would pay off $5,238,217.90 owed to Shaw for work on the PCS facility in 20 monthly installments; (2) a default judgment would be entered to that effect; (3) Shaw's liens on PCS's property would not be cancelled unless Kaiser filed a bond or other security in conformity with the requirements of the LPWA or furnished a $5,300,000 letter of credit; and (4) Shaw would not dismiss its claims and lawsuit against PCS unless Kaiser furnished replacement security or Kaiser's monthly installment payment obligations to Shaw were satisfied. Pursuant to the Compromise Agreement, Kaiser confessed to the allegations in Shaw's petition in its Answer and Confession of Judgment, admitting its default under the subcontract, its debt to Shaw, and the validity of Shaw's claim and privilege against PCS. PCS did not participate in the negotiations and agreements between Shaw and

Kaiser, and Shaw reserved all of its rights against PCS. After a default judgment was entered, Kaiser made installment payments to Shaw totaling $3,201,133.21, but never provided replacement security. Thereafter, Kaiser defaulted the remaining amount, leaving an unpaid principal balance of $2,037,084.77 due Shaw. On June 9, 2000, Kaiser filed a petition in bankruptcy. On October 20, 2000 PCS demanded that, within ten days thereof, Shaw cancel the claim, privilege or lien and dismiss this lawsuit against PCS with prejudice, and on October 26, 2000 Shaw refused.

After the foregoing events, Shaw moved for partial summary judgment on liability only to the effect that, under the LPWA, PCS was personally liable and its nitric acid facility was subject to a privilege for Shaw's uncompensated work on the project. PCS moved for partial summary judgment dismissing Shaw's demands and cancelling Shaw's statements of claim and privilege filed on PCS's property. The parties consented to adjudication before a magistrate judge. On August 3, 2001, the magistrate judge ruled in favor of PCS on both of the cross-motions for summary judgment, dismissing Shaw's claims and ordering Shaw's lien removed from the public records. Thereafter, Shaw and PCS filed a second set of motions for summary judgment concerning attorneys' fees and damages. On December 21, 2001, the magistrate granted summary judgment in favor of PCS and awarded it $61,614.68 in attorneys' fees and damages under La. R.S. § 9:4833 of the LPWA. Both Shaw and PCS appealed.

Shaw argues that the magistrate court erred by holding that PCS was a third party beneficiary of the subcontract and therefore able to demand specific enforcement of Shaw's

obligation to comply with the lien waiver provision. Alternatively, Shaw charges that, if PCS was a third party beneficiary, under Louisiana Civil Code article 1982 Shaw had the right to raise against PCS, as third party beneficiary, defenses based on the contract that it could have raised against Kaiser, had Kaiser made the same demand against Shaw. Specifically, Shaw contends that, when Kaiser materially breached the subcontract, Shaw had the right to refuse to perform its file-no-lien obligation, to employ all rights and defenses against PCS that it may have raised against Kaiser, and to enforce its claim and privilege or lien against PCS and its property under the LPWA.

PCS argues that the magistrate court correctly ruled that Shaw could not raise against PCS the defenses it could have raised against Kaiser, and that, in any event, Kaiser's material breach of the subcontract had no effect upon the lien waiver provision of the subcontract. PCS contends that the magistrate court correctly held that it may as third party beneficiary enforce the lien waiver provision against Shaw, that Shaw's claim and privilege or lien therefore were filed in violation of the lien waiver provision, that Shaw's claim and privilege or lien were improperly filed under the LPWA for the same reason and others, that Shaw therefore cannot hold PCS personally liable or enforce a lien or privilege against PCS's property under the LPWA, that Shaw did not have reasonable cause to refuse to cancel its lien upon PCS's demand, and that Shaw should be taxed with attorney's fees and damages pursuant to the LPWA.

Both Shaw and PCS appealed.

We review rulings on motions for summary judgment *de novo*, applying the same standards prescribed for use by the district court.[7] Cross-motions must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.[8] If there is no genuine issue and one of the parties is entitled to prevail as a matter of law, the court may render summary judgment.[9] Louisiana substantive law applies to this diversity jurisdiction case.[10]

II.

The magistrate court correctly interpreted the subcontract between Kaiser and Shaw as stipulating a benefit for

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[7] *See Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir. 2000).

[8] 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2720 (3d ed. 1998) ("The court must rule on each party's motion [for summary judgment] on an individual and separate basis, determining for each side, whether a judgment may be entered in accordance with the Rule 56 standard.")

[9] 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2720 (3d ed. 1998) ("But if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment.") *Vela v. City of Houston*, 276 F.3d 659, 671 (5th Cir. 2001) (In situations involving cross-motions for summary judgment and upon finding no genuine issues of material fact, this court regularly reverses grants of summary judgment and enters judgment for the opposite party.). *See also Owsley v. San Antonio Independent School Dist.*, 187 F.3d 521, 527 (5th Cir. 1999) (reversing and rendering judgment for the adverse party on cross motions for summary judgment.); *Ehrlicher v. State Farm Ins. Co.* 171 F.3d 212, (5th Cir., 1999) (reversing and rendering judgment for the adverse party on cross motions for summary judgment.); *Gilley v. Protective Life Ins. Co.*, 17 F.3d 775 (5th Cir. 1994) (reversing and rendering judgment for the adverse party on cross motions for summary judgment.)

[10] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

PCS as a third party beneficiary, but it incorrectly concluded that Shaw could not raise against PCS the defenses on the contract that it could have raised against Kaiser.

As the magistrate court, in concluding that PCS was a third party beneficiary of the Kaiser-Shaw subcontract's lien waiver provision, stated:

> Shaw expressly agreed to waive its right to file any liens or claims of any sort against the owner's premises. The subcontract clearly identifies PCS as the owner. . . .
>
> The preamble of the subcontract . . . stated that the subcontract was made pursuant to the contract between PCS and Kaiser. . . . Because of Kaiser's agreement in the prime contract, the subcontract lien waiver provision benefitted both Kaiser and PCS. This arrangement does not render the benefit which Shaw unequivocally conferred upon PCS by agreeing to the condition any less apparent or direct.[11]

Nor do we see any error in the magistrate court's conclusion that PCS adequately manifested its intention to avail itself of the benefit before any attempt was made by Kaiser and Shaw to revoke the stipulation.[12]

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[11] Aug. 3, 2001 Magistrate Court Opinion, at 13-15 (citing *Merco Mfg., Inc. v. J.P. Michael Const. Co.*, 372 F.Supp. 967, 974 (W.D.La. 1974) (footnote omitted)).

[12] *See* La. Civil Code arts. 1978-1979. PCS filed an affidavit by its senior counsel that he had informed Kaiser as early as February 26, 1999 and on numerous other occasions that Kaiser should take no action which would waive or limit PCS's third party beneficiary rights. Shaw offered no evidence to refute these expressions by PCS that implied its intention to avail itself of the benefit. The events that Shaw contends revoked the stipulation occurred after February 1999. "Once

(Continued on following page)

The magistrate court erred, however, in concluding that Shaw could not raise against PCS the defenses based on the subcontract that it had against Kaiser. Louisiana Civil Code Article 1981 provides, in pertinent part, that "[t]he stipulation gives the third party beneficiary the right to demand performance from the promisor."[13] That right is qualified, however, by Louisiana Civil Code Article 1982, which states that "[t]he promisor may raise against the beneficiary such defenses based on the contract as he may have raised against the stipulator."[14] Thus, in the present case, Shaw, the promisor, had the right to raise against PCS, the beneficiary, any defense based on the

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the third party has manifested his intention to avail himself of the benefit, the parties may not dissolve the contract by mutual consent without the beneficiary's agreement." *Id.* art. 1978. "Under this Article, the beneficiary's intention to accept the benefit may be made known in any manner, even implied." *Id.* art. 1978 rev. cmt. b. "The stipulation may be revoked only by the stipulator and only before the third party has manifested his intention of availing himself of the benefit." *Id.* art. 1979.

[13] *Id.* art. 1981.

[14] *Id.* art. 1982. Louisiana Civil Code Article 1982 is similar to the prevailing rule in other jurisdictions. *See* RESTATEMENT (SECOND) OF CONTRACTS § 309(2) (1981) ("If a contract [creating the promisor's duty to the intended beneficiary] ceases to be binding in whole or in part because of . . . present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified."); *Id.* cmt.b. ("Thus a failure of the promisee to perform a return promise ordinarily discharges the promisor's duty to a beneficiary to the same extent that it discharges his duty to the promisee."); 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:55 (4th ed. 2000) (collecting authorities, e.g., *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*,138 F.3d 160, 166 (5th Cir. 1998)).

subcontract that Shaw could have raised against Kaiser, the stipulator or promisee.[15]

The magistrate court concluded that interpreting Article 1982 to allow Shaw to raise against PCS any defense based on the contract that Shaw could have raised against Kaiser, "would negate the right of PCS under articles 1978 and 1981 to accept and demand performance of the stipulation pour autri."[16] We cannot agree. Article

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[15] Article 1982 was adopted in 1984 to "express[ ] a conclusion reached by the Louisiana jurisprudence." La. Civ. Code art. 1982 rev. cmt. (citing *Union Bank of Louisiana v. Bowman*, 9 La. Ann. 195 (1845); *Tiernan v. Martin*, 2 Rob. 523 (1842)); *see also* J. Denson Smith, *Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 TUL. L. REV. 18, 57 (1936-37) ("[T]he promisor may oppose the suit of the beneficiary any defenses arising from the contract which are available to him as against the promisee such as that the contract was ineffective because . . . there was a failure of consideration, or of a condition upon which performance of the promise was made to depend." (citing *Bowman*, 9 La. Ann. at 195, *Brandon v. Hughes*, 22 La. Ann. 360 (1980); *Janney v. Ober*, 28 La. Ann. 281 (1876); *Tennent v. Caffrey*, 129 So. 128 (1930))); 2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW, No. 1264(5) (La. State L. Inst.Transl. 1959) ("*Failure by the Stipulator to Execute his Obligations*. If the stipulator has not carried out his own obligations to the promisor, the latter is discharged from his obligation to the third person. . . . [I]t is in conformity to the apparent will of the parties to presume that the promisor is not obligated to the third person except in consideration of the obligations towards him.").

[16] The magistrate court's reasoning seems to be based on the incorrect assumption that the beneficiary's right must be considered as either an absolute right or a nullity. The court's full statement provides:

> Article 1981 grants both the stipulator and the third party beneficiary the right to demand performance. Under the second part of the article, if Kaiser demanded performance it would be doing so not for itself but for PCS. By exercising its equal right under article 1981 to claim the benefit of the stipulation, PCS cannot be exercising greater or better rights than Kaiser. Interpreting article 1982 as suggested by Shaw in the context of this case, would negate the

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1982 only subjects the beneficiary's demand for performance from the promisor to the same contractual defenses which would apply if the stipulator demanded performance under the contract. Article 1982 would have no application to a case in which the promisor has no defense based on the contract against the stipulator or promisee. Thus, Article 1982 does not "negate" or nullify the third party beneficiary's right to avail himself of the benefit and demand performance from the promisor under Articles 1978 and 1981. In sum, when we interpret Article 1982 in reference to the other code articles on the same subject,[17] as we think the Louisiana Supreme Court would, we conclude that the beneficiary's right is not absolute or independent. Inherently, it is a right derived solely from the third party beneficiary contract between the promisor and the stipulator or promisee. Unsurprisingly, then, the Code provides in Article 1982 that the beneficiary's right is amenable to the same defenses based on that contract that the promisor may use against the stipulator or promisee.

In comparison, this contextual interpretation of Article 1982 is consistent with the prevailing general rule recognized by other American jurisdictions.[18] "As with any contract, the promisor's and promisee's substantive purpose in entering a third party beneficiary contract is the performance of the mutual promises. If the promisee fails

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right of PCS under articles 1978 and 1981 to accept and demand performance of the *stipulation pour autri*.

Aug. 3, 2001 Magistrate Court Opinion, at 19 (footnote omitted).

[17] *See* La. Civ. Code art. 13 ("Laws on the same subject matter must be interpreted in reference to each other.")

[18] *See supra* note 12.

to perform, the promisor has not received the agreed consideration. Under these circumstances, it is manifestly unjust to allow a mere donee to enforce the promise. Even creditor beneficiaries are not entitled to any greater right than their debtor possessed."[19] This reading of Article 1982 is also in accord with Marcel Planiol's treatise on the civil law, which states that "[i]f the stipulator has not carried out his own obligations to the promisor, the latter is discharged from his obligation to the third person."[20] Planiol maintained this view, despite disagreement from "[c]ertain authors" at the time, because "it is in conformity to the apparent will of the parties to presume that the promisor is not obligated to the third person except in consideration of the obligations towards him."[21]

For these reasons, we conclude that the Louisiana high court would follow the plain words of Article 1982 and allow Shaw to raise against PCS such defenses based on the subcontract as it may have raised against Kaiser. Accordingly, we turn to an examination of the Civil Code rights and defenses that Shaw argues it could have raised against Kaiser had Kaiser demanded that Shaw perform its obligation arising from the subcontract's waiver of right to file liens provision.

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[19] 13 LORD, WILLISTON ON CONTRACTS, *supra* note 12, § 37:56. (internal footnotes omitted).

[20] 2 PLANIOL, TREATISE ON THE CIVIL LAW, *supra* note 13, No. 1264(5); *see also* Smith, *supra* note 13, at 57 (citing *Bowman*, 9 La. Ann. at 195, *Brandon v. Hughes*, 22 La. Ann. 360 (1980); *Janney v. Ober*, 28 La. Ann. 281 (1876); *Tennent v. Caffrey*, 129 So. 128 (1930)).

[21] 2 PLANIOL, TREATISE ON THE CIVIL LAW, *supra* note 13, No. 1264(5).

III.

Shaw's most relevant argument is that it was entitled, because of Kaiser's material breach of the commutative subcontract between them, to rescind the contract and invoke a non-breaching party's right under La. C.C. art. 2022 to refuse to perform its own obligations under the contract. Consequently, Shaw further contends, it was entitled to refuse to perform its obligation not to file liens even as to PCS, the third party beneficiary, because Civil Code article provides that "[t]he promisor [Shaw] may raise against the beneficiary [PCS] such defenses based on the contract as he may have raised against the stipulator [Kaiser]." For the reasons now assigned, we conclude that Shaw's arguments have merit.

A.

The subcontract between Kaiser and Shaw was a commutative contract making "the performance of the obligation of each party . . . correlative to the performance of the other,"[22] as well as a bilateral or synallagmatic contract in which "the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other."[23]

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[22] La. Civ. Code art. 1911 and rev. cmt.(b)&(c); *see Morris v. Homco International, Inc.*, 853 F.2d 337, 342 (5th Cir. 1988); SAÚL LITVINOFF, 5 CIV. L. TREATISE § 15.12 (2d ed. 2001); ALAIN A. LEVASSEUR, PRECIS IN CONVENTIONAL OBLIGATIONS: A CIVIL CODE ANALYSIS 24 (Michie, 1980) ("A contract is commutative when a party considers that what he gives or does is the equivalent of what it will receive from the other party.")

[23] La. Civ. Code art. 1908 and rev. cmt.(b) (citing 1 SAÚL LITVINOFF, OBLIGATIONS 396-400 (1969); *see Morris*, 853 F.2d at 342; *cf* . . . , *Stockstill v. Byrd*, 132 La. 404, 407, 61 So. 446, 447 (1913) ("The courts

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"Either party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously."[24] Therefore, when

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at the present day incline strongly against the construction of promises as independent; and, in the absence of clear language to the contrary, promises which form the consideration for each other will be held to be concurrent or dependent, and not independent, so that a failure of one party to perform will discharge the other, [and] so that one cannot maintain an action against the other without showing the performance or tender of performance on his part."); *Accord*: 15 LORD, WILLISTON ON CONTRACTS, *supra* note 14, § 44:5 ("The modern rule adopts a presumption that mutual promises in a contract are dependent and are to be so regarded, whenever possible."); §44:11 ("Under the modern view, promises in a contract are generally presumed to be dependent unless a contrary intent is shown.") (also quoting RESTATEMENT (Second) of Contracts § 232); *Foley Lumber Industries, Inc. v. Buckeye Cellulose Corp.*, 286 F.2d 697, *700 (5th Cir. 1961) ("Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the inclination of courts has strongly favored the latter construction, as being obviously the most just." (quoting *Bank of Columbia v. Hagner*, 1828, 1 Pet. 455, 465, 26 U.S. 455)).

[24] La. Civ. Code art. 2022 and rev. cmt.(b) (citing 2 SAÚL LITVINOFF, OBLIGATIONS 426-434, 501-506 (1975)). The Second Restatement of Contracts expresses a similar principle in the introduction to Chapter 10 on Performance and Nonperformance:

> The most important and complex of the rules stated in this Chapter apply to the most significant type of contract, that in which the parties have exchanged promises in the expectation that there will be a subsequent exchange of performances. . . .
>
> When a party fails to receive the performance that he expects, . . . [i]t is, therefore generally fairer to give the injured party, to the extent that it is possible, the right to suspend his own performance and ultimately to refuse it and, if the other party's nonperformance is not justified, to claim damages for total breach of contract.

RESTATEMENT (SECOND) OF CONTRACTS ch. 10 intro. note, at 193-94.

Kaiser failed to perform its obligation under the subcontract of making payments for work done by Shaw, Shaw had the right to refuse to perform its obligation under the subcontract.[25]

More important, when it became evident that Kaiser would not perform its subcontract obligation, Shaw had the right to consider the subcontract and all of its provisions dissolved[26] and the parties restored to the situation

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[25] Article 2022 gives "general formulation to the *exceptio non adimpleti contractus* (defense of nonperformance)." La. Civ. Code art. 2022 rev. cmt. b. As Planiol explained, the "exception *non adimpleti contractus* . . . is interposed when one of the parties is claiming of the other the performance of his engagement, without himself offering what he owes; such party is nonsuited by the filing of the above mentioned exception." 2 PLANIOL, TREATISE ON THE CIVIL LAW, *supra* note 13, No. 949(2). "[W]hen two persons obligate themselves the one to the other, each one of them gives only but conditional consent to the act; one obligates himself because the other also obligates himself towards him. The reciprocity of the obligations necessarily implies performance and this concept leads, on the one hand, to a 'give and take' system of performance or to the *exceptio non adimpleti contractus* . . . , and on the other hand, to the right to demand the resolution when it was too late to oppose the said exception because the obligation was already performed." *Id.* No. 1309.

[26] La. Civ. Code art. 2016 ("[W]hen it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without any notice to the obligor."); *id.* rev. cmt. ("Louisiana courts have established that a putting in default is not necessary when the obligor has communicated an intention not to perform, or in a situation where time is of the essence (citing *Allen v. Steers*, 2 So. 199 (1887); *Abels v. Glover*, 15 La. Ann.247 (1860); *Kinsell & Locke, Inc. v. Kohlman*, 126 So. 257 (La. App. Orl. 1930))); *id.* art. 2013 ("When the obligor fails to perform, the obligee has a right to the judicial dissolution of the contract or, according to the circumstances, to regard the contract as dissolved.").

Planiol explained some of the principles underlying the right of resolution or dissolution as follows:

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that existed before the subcontract was made.[27] Thus, the "dissolution operates retroactively,"[28] "has a retrospective

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Art. 1184 in establishing the action of resolution, indicates in the following terms the circumstances which gives rise to it: "in case one of the contracting parties does not comply with his engagements." The law is not precise as to the nature of the cause which prevents him from complying. . . . The text makes no distinction, and the jurisprudence therefore concludes, as do the majority of the authors, that there is an action in resolution, whatever is the cause for which the adverse party fails to comply with his engagements."

2 PLANIOL, TREATISE ON THE CIVIL LAW, *supra* note 13, No. 1313 (citations omitted).

The action in resolution established by Art. 1184 is given only to the party who is ready to perform his engagement or who has already performed it. The other party has no right to the resolutions of the contract. . . . It is natural, therefore, that the party at fault should suffer the resolution by the will of the other, without being able to demand it himself.

Id. No. 1314 (citations omitted).

The party entitled to the action of resolution is not limited to this means only; he has the choice of resolving the contract or of demanding its performance if he prefers it, provided that the fault of the debtor has not rendered such performance impossible.

Id. No. 1315.

The resolution of the contract is not sufficient in itself to completely satisfy the plaintiff. His recovering or keeping the object of his obligation often does not give him the contemplated profits he would have obtained upon the effective performance of the contract. To compensate him for the damage suffered by this loss of profits, he is entitled to damages to be fixed by the judge.

Id. No. 1317.

[27] La. Civ. Code art. 2018 ("Upon dissolution of a contract, the parties shall be restored to the situation that existed before the contract was made."); *see Sliman v. McBee*, 311 So. 2d 248, 252 (La. 1975) ("The effect [of dissolution] is to place all parties in the same position they occupied prior to the sale."); *Louis Werner Saw Mill Co. v. White*, 17 So. 2d 264, 268 (La. 1944) ("The effect of the dissolution is to place matters in the same state as though the obligation had not existed."); *U.S. v.*

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effect to the day that the engagement was contracted,"[29] and "the parties are restored to the situation in which they would be if the contract had not been entered into."[30]

Moreover, under the Louisiana Supreme Court's decisions, in order for a party to waive his right to dissolve a commutative contract upon the other party's material breach, the non-breaching party must express therein his intent to relinquish that right in words that make specific reference to the action to dissolve. In the leading case of *Sliman v. McBee*,[31] Mrs. Sliman sold immovable property to the McBees, her daughter and son-in-law.[32] In the act of sale, Mrs. Sliman waived her vendor's privilege stating that "no lien shall exist on the lots here sold securing payment" of the notes given by the McBees as part of the purchase price.[33] The McBees defaulted and Mrs. Sliman brought suit for dissolution of the sale for nonpayment.[34]

Maniscalco, 523 F.Supp. 1338, 1342 (E.D.La. 1981) ("The effect of the resolutory condition is codified in Article 2130 which states that obligations are "extinguished" by the effect of the dissolving condition.").

[28] 2 A.N. YIANNOPOULOS, LA. CIVIL LAW TREATISE: PROPERTY § 233, at 469 (4th ed. 2001).

[29] *Liquidators of Prudential Sav. & Homestead Soc. v. Langermann*, 100 So. 55, 61 (La. 1924); *McKenzie v. Bacon*, 5 So. 640 (La. 1889).

[30] *Hood v. Southern Prod. Co.*, 19 So. 2d 336, 341 (La. 1944) (dictum); *Sliman v. McBee*, 311 So. 2d 248, 252 (La. 1975) ("[T]he seller may sue for dissolution of the sale and return of the property. The effect is to place all parties in the same position they occupied prior to the sale." (citations omitted)).

[31] 311 So. 2d 248 (1975).

[32] *Id.* at 249.

[33] *Id.* at 250.

[34] *Id.* at 251.

The trial and appeals courts both decided against Mrs. Sliman, the latter holding that she had waived not only her vendor's lien but also her right to dissolution of the sale for nonpayment.[35] The Louisiana Supreme Court reversed, holding that (1) a "dissolving, or resolutory, condition is implied in all commutative contracts and takes effect upon the failure of either party to comply with his engagement and the demand for dissolution by the aggrieved party;"[36] (2) the right of dissolution is an independent, substantive remedy in no way dependent upon the existence of a security device such as a mortgage or a privilege;[37] (3) in order to waive the separate and independent right of dissolution the non-breaching party must "express her intent to relinquish that right in words that make specific reference to the action to dissolve as distinguished from the action to enforce the contract;"[38] (4) the language in the act of sale does not constitute a waiver by Mrs. Sliman of her right to rescind the sale upon the McBees' default in payment of the purchase price.[39] "The fact that the vendor has lost, or not preserved, his vendor's

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[35] *Id.* at 250-51.

[36] *Id.* at 252 (citing and quoting La. Civ. Code art. 2045 (1870): "The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed.")

[37] *Id.* The right to dissolution arises from the contract itself. La. Civ. Code art. 2013 comment (b).

[38] *Id.*

[39] *Id.* at 253.

lien, or mortgage, presents no sort of obstacle to the exercise of this right of resolution."[40]

The already strong right to dissolution was preserved and strengthened by the 1984 revision of Title III of Book III of the Louisiana Civil Code of 1879, "Of Obligations." Article 2013 "reproduces the substance of C.C. Arts. 2046 and 2047 (1870) and also provides that, according to the circumstances, the obligee has a right to regard the contract as dissolved, a right recognized by the Louisiana jurisprudence in numerous decisions."[41] Further,

> Under this Article, either party to a contract may seek dissolution upon the other's failure to perform. [T]his remedy is [no longer] predicated upon a resolutory condition implied in every commutative contract. This Article abandons both that rationale and that limitation, in accordance with modern doctrine. Nevertheless, *under this Article a party's right to dissolution because of the other party's failure to perform arises from the contract itself, and to that extent it can*

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[40] *Id.* at 253 n.8 (quoting *Stevenson v. Brown*, 32 La. Ann. 461, 463 (1880)).

[41] La. Civ. Code art. 2013 rev. cmt. a (citations omitted). Article 2013 (1984) provides:

> When the obligor fails to perform, the obligee has a right to the judicial dissolution or the contract or, according to the circumstances, to regard the contract as dissolved. In either case, the obligee may recover damages.
>
> In an action involving judicial dissolution, the obligor who failed to perform may be granted, according to the circumstances, an additional time to perform.

be said to be implied in it, although not in the form of a resolutory condition.[42]

Louisiana Civil Code Article 2018, in part, provides that: "Upon dissolution of a contract, the parties shall be restored to the situation that existed before the contract was made."[43] "It expresses a principle that is implied in C.C. Arts. 1901, 1903, 2045, and 2046 (1870)."[44]

Thus, we conclude, as we think the Louisiana Supreme Court would, that the subcontract provision by which Shaw "agrees to and does waive its right to file any mechanic's lien or claims" against PCS's property, does not constitute a waiver by Shaw of its dissolution rights because it does not express Shaw's intent to relinquish the right to dissolution "in words that make specific reference to the action to dissolve."[45] Further, that waiver provision is simply too vague, indefinite, and uncertain to indicate that the parties intended for it to supersede all of Shaw's rights against Kaiser regardless of Kaiser's material failure of performance. For these reasons, Shaw's right of dissolution upon Kaiser's material breach was not affected by Shaw's agreement to waive the right to file liens and claims against PCS.

Accordingly, when Kaiser materially defaulted on its obligation of performance, Shaw had the right to regard the subcontract as having been dissolved. Upon its dissolution, the parties were restored to the situation that

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[42] *Id.* rev. cmt. b (citations omitted) (emphasis added).

[43] *Id.* art. 2018.

[44] La. Civ. Code art. 2018 rev. cmt. a.

[45] *Sliman v. McBee*, 311 So.2d at 252.

existed before the contract was made.[46] Therefore, when PCS filed its counterclaim seeking, as third party beneficiary standing in Kaiser's shoes, to enforce the erstwhile lien waiver provision, it was not entitled to do so. That provision had been dissolved as part of the dissolved subcontract; and Shaw was free of any obligation created by the parties' agreement to the waiver provision because Shaw had been restored to the situation that existed before the subcontract. Consequently, after the dissolution and restoration Shaw had a right under the LPWA to file a claim and a privilege against PCS's property and to seek recovery from PCS personally for uncompensated work on PCS's nitric acid facility; when Shaw took these actions the subcontract and Shaw's obligations under it had been dissolved ab initio. Therefore, the dissolved lien waiver provision and any obligation created by it could not have any effect upon Shaw's ability to exercise its rights under the LPWA against PCS and its property.

In other words, PCS, whose right as a third party beneficiary can rise no higher than the right of Kaiser, its stipulator-promisee, is not entitled to enforce the lien waiver provision as if that obligation were separate and independent from the other obligations arising from the subcontract. PCS is amenable to Shaw's defense and right of dissolution just as Kaiser would have been if it had sought to enforce the lien waiver provision.

B.

PCS argues that, despite Kaiser's material breach giving rise to Shaw's rights and defenses, the magistrate

[46] La. Civ. Code art. 2018 (1984).

court's ruling was correct and the lien waiver provision may still be enforced by PCS against Shaw because "'[A] mechanic's lien can be obtained only if there is a breach of contract and if . . . a breach of contract nullifies a written waiver of lien, then there would be no way to effectively waive the right to a mechanic's lien.'"[47] PCS relies principally upon this rationale, which it quotes from the Illinois Court of Appeal's opinion in *Jankoviak v. Butcher*,[48] a 1959 decision applying the Illinois mechanics' lien statute to uphold a home builder's lien waiver in its contract after an owner refused to pay the home builder.

PCS's argument is not relevant, however, because it is based on Illinois rather than Louisiana law. In this diversity jurisdiction case, we must apply Louisiana law, and in resolving any issues of interpretation or application, we must decide as we think the Supreme Court of Louisiana would. For several reasons, we believe that the Louisiana high court would refuse to borrow and apply the Illinois court's interpretation of the Illinois mechanics' lien statute here as urged by PCS.

To borrow the rule of decision from an Illinois case would require a drastic departure from the civil law methodology followed by the Louisiana Supreme Court. In Louisiana, "[t]he sources of law are legislation and custom."[49] These authoritative or primary sources of law are to be "contrasted with persuasive or secondary sources of law, such as [Louisiana and other civil law] jurisprudence,

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[47] PCS Original Brief, at 28 (citing and quoting *Jankoviak v. Butcher*, 159 N.E.2d 377, 378 (Ill. App. 2d Dist. 1959)).

[48] *Jankoviak*, 159 N.E.2d at 377-78.

[49] La. Civ. Code art. 1.

doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom."[50] "It is axiomatic that in Louisiana, courts must begin every legal analysis by examining primary sources of law: the State's Constitution, codes, and statutes."[51] "[O]ur ultimate `*Erie* guess' requires that we employ the appropriate Louisiana methodology to decide this issue the way that we believe the Supreme Court of Louisiana would decide it."[52] We are convinced that the Louisiana high court would not depart from its usual civil law methods of examining first the primary sources of law applicable to the present case, the Louisiana Civil Code and the LPWA. Therefore, we do not believe that the Louisiana high court would, in a case under the Civil Code or the LPWA, borrow and apply a rule of decision from an Illinois court's interpretation of the Illinois mechanics' lien law. In addition, it is likely that no state supreme court would consider applying case law based on any other jurisdiction's mechanics' lien statute

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[50] *Id.* rev. cmt. b. (citing A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM §§ 31, 32 (1977).

[51] *Prytania Park Hotel, Ltd. v. General Star Indem. Co.*, 179 F.3d 169, 174 (5th Cir. 1999); *see also Smith v. Southern Holding, Inc.*, 839 So. 2d 5 (La. 2003); *Cole-Miers Post* 3619 *V.F.W. of DeRidder v. State, Dept. Of Rev. & Taxation, Office of Alcoholic Beverage Control*, 765 So. 2d 312 (La. 2000); Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727, 727-728 (1962) ("[T]he primary basis of law for a civilian is legislation, and not (as in the common law) a great body of tradition in the form of prior decisions of the courts. . . . The Louisiana judge must, as stated, find primarily in legislative enactments the legal principles to be applied in deciding the case before him.").

[52] *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 197 (5th Cir. 2003).

because of the notorious diversity of such laws among the states.[53]

In fact, the Illinois mechanic's lien statute is crucially different from the LPWA. The 1959 *Jankoviak* decision is inapposite Illinois jurisprudence because it was based on two features of the Illinois mechanics' lien statute that differ crucially from the LPWA. First, the Illinois court noted that the Illinois statute provided that "[i]f the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by

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[53] *See, e.g.*, UNIFORM CONSTRUCTION LIEN ACT prefatory note, 7 U.L.A. 2 (2002) ("All states presently have mechanics' lien laws. Those laws present an extraordinarily varied approach, in substance, and in language, to the issues involved in mechanics' lien legislation. In fact, variation among the states may be greater in this area than in any other statutory area."); 53 AM. JUR. 2d *Mechanics' Liens* § 7 ("The mechanic's lien laws of the various states are notorious for the extent to which they vary from each other in their application and operation. The diversity in the mechanic's lien laws of the various states diminishes, and may often nullify, the value of a decision from one state as a precedent in another, and courts often reject the asserted authority of a decision from another jurisdiction, or regard it as being of little or no value" (footnotes omitted)); Ethan Glass, *Old Statutes Never Die . . . Nor Do They Fade Away: A Proposal for Modernizing Mechanics' Lien Law By Federal Action*, 27 OHIO N.U. L. REV. 67 (2000) ("State statutes create many different rules regarding what property can be impaired by a mechanics' lien, who is entitled to claim a mechanics' lien, how a mechanics' lien may be created, and what the result is of the creation of a mechanics' lien. The ongoing theme to remember is that there are fifty-two jurisdictions with fifty-two different laws.").

The variety in state lien laws is particularly evident with respect to the effect of lien waiver clauses on lien rights. *See* 8 LORD, WILLISTON ON CONTRACTS, *supra* note 12, § 19:58 ("There is a conflict in the cases as to the effect of a contractor's waiver in a building contract of his right, or that of subcontractors or materialman, to file mechanics' liens, with perhaps a majority of states refusing to permit such waivers, except upon or following payment." (footnote omitted)).

anyone, such provision shall be binding."[54] Second, that court's decision was also based on the Illinois statutory requirement that a mechanic's lien could he obtained only if there was first a breach of contract.[55]

The LPWA does not make the breach of a contract indispensable to obtaining a lien, as the Illinois mechanics' lien law does. Under the LPWA, as soon as the work has been substantially completed or abandoned or the owner has filed a notice of termination, a subcontractor may file and obtain a lien, regardless of whether there has been a breach of contract.[56] Thus, under the LPWA, the subcontractor is not forced by law to wait until the general contractor actually defaults before filing a claim or privilege, as he would have to do under the Illinois statute. Moreover, unlike the Illinois statute, the LPWA does not declare that a contract between the owner and the contractor prohibiting the future filing of liens or claims by anyone "shall be binding." In sum, the LPWA is more

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[54] *Jankoviak*, 159 N.E.2d at 378.

[55] *Id.* The Illinois statute may have been anomalous and contrary to a basic principle of contract law. "[I]t is essential to waiver that the right allegedly waived exist at the time of the waiver; a party may not waive any right it does not yet have. After a contract has been made, on the other hand, the right to performance under the contract may generally be waived either before or after the time when performance is due." 13 LORD, WILLISTON ON CONTRACTS, *supra* note 12, § 39.10 (footnotes omitted); *see also* 31 C.J.S. *Estoppel* § 75 ("[A] waiver implies and requires the existence of the right in question at the time of the alleged waiver; there can be no waiver of a right before it exists, before a person is in a position to assert it, or after it has been lost."); 28 AM. JUR. 2d *Estoppel* § 201 ("To constitute a waiver, the right or privilege claimed to have been waived must generally have been in existence at the time of the purported waiver. So, a person cannot waive a right before he or she is in a position to assert it.").

[56] La. R.S. § 9:4822(C).

favorable to a subcontractor than the Illinois mechanics' lien statute, because the LPWA does not limit his access to Civil Code and LPWA rights and remedies in case the general contractor breaches the contract, and the LPWA does not make breach of contract a sine qua non to the subcontractor's right to file a claim or lien against the owner's property.

For these reasons, we are not persuaded by PCS's argument based on the Illinois case and statute.

C.

PCS does not advance any other argument or authority for the proposition that it, as a third-party beneficiary, may require that the Kaiser-Shaw subcontract's lien waiver provision be enforced despite Shaw's rights of dissolution and restoration evoked by Kaiser's material breach of that contract[57] Our own research leads only to

[57] PCS cites a number of Louisiana cases cursorily mentioning or using waiver without defining it or discussing its nature, conditions or scope. *Hero & Co. v. Farnsworth & Chambers Co.*, 107 So. 2d 650 (La. 1958); *Wardlaw Bros. Garage, Inc. v. Thomas*, 140 So. 108 (La. App. 2d Cir. 1932); *Babineaux v. Grisaffi*, 180 So. 2d 888 (La. App. 3d Cir. 1965); *Bank of Jena v. Rowlen*, 370 So. 2d 146 (La. App. 3d Cir. 1979); *Executive Office Centers, Inc. v. Cournoyer*, 433 So. 2d 324 (La. App. 4th Cir. 1983). *See also Union Texas Petroleum v. PLT Eng'g*, 895 F.2d 1043, 1053 n.16 (5th Cir. 1990); *Toomer v. Price*, 122 So. 856, 856-58 (La. 1929). However, these cases do not address or support PCS's position that, as third party beneficiary, it may assert greater or better rights against Shaw than Kaiser, its stipulator-promisee, after Kaiser's material breach of the subcontract of which the third party stipulation was a part. And, while these cases may support a conclusion that Louisiana courts will enforce "lien waivers" executed in exchange for contemporaneous payment or alternate security, they are not support for enforcement of a waiver where there has been a failure of cause or consideration or material breach of a commutative contract. As Shaw

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additional reasons to doubt that the Louisiana Supreme Court would affirm that litigation position.

The Kaiser-Shaw subcontract, after stating that Shaw "agrees to and does waive" its right to file claims and liens against PCS's property, does not expressly state what legal effects the parties intended for the provision to have. The term "waiver" does not appear to have any fixed meaning or connotation in Louisiana law to which it can be assumed that the parties must have referred. The Louisiana Civil Code, which regulates nominate contracts and juridical acts in detail, does not provide definition or regulation for a contract or act of waiver.[58] The LPWA does not define or regulate waiver either.[59]

We have found but three cases in which the Louisiana Supreme Court comprehensively defined "waiver." In two insurance coverage cases, involving whether an insurer had waived a coverage exclusion, and whether an insurer had waived a condition precedent of sound health, the state high court stated that "[w]aiver occurs when there is *an existing right, a knowledge of its existence* and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right as to induce a reasonable

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correctly points out, they are distinguishable factually, contractually, and on other grounds. Shaw's 2d brief, pp. 11-13.

[58] The Civil Code in several articles provides for the "renunciation" of certain accrued or existing rights. *See* La. Civ. Code art. 626 (usufruct); *id.* arts. 737 & 771-772 (predial servitudes); *id.* arts. 963-966 (successions); *id.* art. 1780 (obligations with a term); *id.* art. 1802 (solidary obligations); id. 2348 (matrimonial regimes); *id.* art. 2978 (sequestration); *id.* art. 3029 (mandate); *id.* arts. 3449-3451 (prescription). The Code does not, however, provide a general definition of "renunciation" applicable to other rights.

[59] La. R.S. § 9:4801, *et seq.*

belief that it has been relinquished."[60] In a third case the Louisiana Supreme Court, in deciding whether homeowners had waived their rights to sue the builder for noncompliance with building plans and specifications, defined waiver in similar but more comprehensive terms: "Though there are various definitions of the term 'waiver', it can be comprehensively defined as a voluntary and intentional relinquishment or abandonment of *a known existing legal right*, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed.[61] If these waiver definitions apply here, Shaw would not have been able, when the Kaiser-Shaw subcontract was formed, to waive a right to file claims and liens against PCS's property. Shaw had no *known existing legal* right to file a claim or lien against PCS at the inception of the subcontract under which it had not yet performed any work. We are not called upon to make an *Erie* guess as to whether the Louisiana Supreme Court would apply those definitions of waiver here. But their existence in the court's jurisprudence is consistent with our undiminished *Erie* duty to follow and apply the Louisiana Supreme Court's rule against finding that a party has waived the right of

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[60] *Steptore v. Masco Constr. Co., Inc.*, 643 So. 2d 1213, 1216 (La. 1994) (emphasis added) (citing *Tate v. Charles Aguillard Ins. & Real Estate, Inc.*, 508 So. 2d 1371 (La.1987); *Ledoux v. Old Republic Life Ins. Co.*, 233 So. 2d 731 (La.App. 3d Cir. 1970); *Peavey Co. v. M/V ANPA*, 971 F.2d 1168 (5th Cir.1992)). In *Tate v. Charles Aguillard Insurance & Real Estate, Inc.*, the court stated: "Of course, reliable proof of such a knowing and voluntary waiver is necessary and the burden of producing it, as in the proof of obligations generally, falls on the party who demands performance." 508 So. 2d at 1375 (citing La. Civ. Code art. 1831; *id.* art. 2232 (1870)); *see also* BLACK'S LAW DICTIONARY 1574 (7th ed. 1999) ("The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.").

[61] *Breaux v. Laird*, 88 So. 2d 33, 38 (La. 1956) (emphasis added).

dissolution of a contract, unless she "express[es] her intent to relinquish that right in words that make specific reference to the action to dissolve[.]"[62]

In sum, we have not discovered any basis in Louisiana law for concluding that a third party beneficiary, such as PCS, has a right to demand performance from the promisor, like Shaw, even though the contracting party through which the beneficiary claims, Kaiser, the stipulator-promisee here, has materially breached the underlying contract and caused its dissolution. PCS's reliance on inapposite Illinois authority indicates that it also was unable to find Louisiana law to support its position. Consequently, in the absence of clear language in the subcontract to the contrary, we conclude that Shaw did not relinquish, but may enforce, its right to dissolution, and restoration. Consequently, PCS may not enforce the dissolved lien waiver provision against Shaw. Accordingly, unless we find merit in PCS's alternative argument, Shaw is entitled to enforce its claim and lien, holding PCS liable under the LPWA.

IV.

A.

Alternatively, PCS urges us to affirm the summary judgment in its favor on a ground that the magistrate court did not reach, viz., that the statement of claim and privilege filed by Shaw did not reasonably identify the immovable with respect to which its work was performed.

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[62] *Supra*, n. 34.

The LPWA provides that a statement of a claim or privilege must reasonably identify the immovable with respect to which the work was performed and its owner.[63] "The purpose of a statement of claim or privilege is to give notice to the owner (and contractor) of the existence of the claim and to give notice to persons who may deal with the owner that a privilege is claimed on the property."[64] "Technical defects in the notice should not defeat the claim as long as the notice is adequate to serve the purposes intended,"[65] The filing of a statement of a claim or privilege is accomplished when it is filed for registry with the recorder of mortgages of the parish in which the work is to be performed.[66] Each filing made with the recorder of mortgages which contains a reference to immovable property shall contain a description of the property sufficient to clearly and permanently identify the property. A description which includes the lot and/or square and/or subdivision or township and range meets the requirement of the Act.[67] Naming the street or mailing address without more is not sufficient.[68]

On February 17, 1999 Shaw filed with the recorder of mortgages in Ascension and Iberville Parishes an amended and supplemental statement of claim and privilege in the

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[63] La. R.S. 9:4822.G.(3)

[64] *Id.*, cmt. (g) (citing Mercantile Nat. Bank of Dallas v. J. Thos. Driscoll, Inc., 195 So. 497 (La. 1940); See Hibernia National Bank v. Belleville Historic Development, L.L.C., 815 So.2d 301,*306 (La. App. 4th Cir. 2002).

[65] *Id.*

[66] La. R.S. 9:4831.A.

[67] La. R.S. 9:4831.C.

[68] *Id.*

amount of $5,350,000 (modifying its original statement of claim and privilege for $1,389,707.04 filed January 27, 1999)[69] for labor, equipment, materials and other engineering and construction services supplied to Kaiser to improve the immovable property of PCS. To describe PCS's tract of land upon which its plant is located, it appears that Shaw used the surveyor's legal property description contained in the deed by which PCS acquired title to the tract. The tract evidently borders on the Mississippi River at the boundary line between Ascension and Iberville Parishes, so that the tract includes land contiguously located in each parish. In other words, the line between the parishes runs through PCS's tract and intersects its river-front boundary at some point not precisely disclosed in this record. The surveyor's legal description does not attempt to specify which part of the tract lies in each parish but simply begins by stating that the land is located east of the Mississippi River in Ascension and Iberville Parishes.[70] Apparently, the same deed of acquisition using the same surveyor's legal description was

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[69] Shaw's original statement of claim and privilege filed January 27, 1999 in both parishes was essentially the same as the amended and supplemental statement, except for lesser amount of $1,389,707.04. The same surveyor's legal property description was attached as in Exhibit A of the amended and supplemental statement. Both statements were filed timely and are essentially the same in other respects. Therefore, we will discuss in detail only the amended and supplemental statement of February 17, 1999.

[70] The property description begins:

> Legal Description
> South Tract
>
> A TRACT OF LAND LOCATED IN SECTIONS 74, 75, &T95-R/E SECTIONS 38, 39, & 40, T95-R2E, SOUTHEASTERN DISTRICT, EAST OF MISSISSIPPI RIVER, ASCENSION & IBERVILLE PARISH, LOUISIANA

recorded by PCS in both Ascension and Iberville Parishes. In any event, it is undisputed that Shaw's statement of claim and privilege uses the only legal description pertaining to PCS's property that is recorded in Ascension and Iberville Parishes. Also, it is undisputed that PCS has not made available to Shaw any other legal property description to substitute for the legal property description recorded in the two parishes.

It is evident from the property description that the PCS tract upon which the construction was performed is bounded by identifiable railroad, electric utility, state highway rights of way, and by identifiable tracts owned by a number of other named industries, as well as the Mississippi River.[71] It is undisputed that the 1265 STPD Nitric

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[71] More specifically, Shaw's amended and supplemental statement of claim provides, in pertinent part, as follows:

> ICF Kaiser Engineers, Inc . . . entered into a contract with the Owners of certain property believed to be PCS Nitrogen Fertilizer, L.P. . . . whose address is Louisiana Highway 3115 and 30, Post Office Box307, Geismar, La 70734 to provide labor, equipment, materials and other construction services for the construction of a project called "1265 STPD NITRIC ACID FACILITY."
>
> . . . Pursuant to [the Kaiser-Shaw] subcontract, SHAW supplied labor, equipment, materials and other engineering/construction services to . . . Kaiser . . . to improve the immovable property described . . . below.
>
> The subject immovable property, upon which the work was performed, is owned by . . . PCS Nitrogen Fertilizer, L.P. . . . which immovable property is further described on
>
> *Exhibit A* attached hereto and made a part hereof.

Exhibit A consists of a surveyor's lengthy metes and bounds property description, entitled and commencing as follows:

> Legal Description
> South Tract

(Continued on following page)

Acid Facility was erected at the PCS plant located within the described PCS tract near Geismar, Louisiana;[72] that the prime PCS-Kaiser contract provides that PCS will pay Kaiser $38,890,000 for the construction of the 1265 Nitric Acid Facility;[73] and that Shaw was not paid $5,350,000 for the labor, equipment, materials and other engineering/construction services that it alone had contributed to the project.

The Louisiana courts have not added any legal gloss to the LPWA's requirement that a statement of a claim or privilege shall "reasonably identify" the property with respect to which the work was performed, for the purpose of notifying the owner, contractor, and persons dealing with the owner that a privilege is claimed on the property, and should be upheld despite technical defects if the notice is adequate to serve the purposes intended.[74] They have simply applied the unvarnished statutory standards and terms to each varying factual situation to determine

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A TRACT OF LAND LOCATED IN SECTIONS 74, 75, &T95-R/E SECTIONS 38, 39, & 40, T95-R2E, SOUTHEASTERN DISTRICT, EAST OF MISSISSIPPI RIVER, ASCENSION & IBERVILLE PARISH, LOUISIANA

[72] See PCS Br. at 9.

[73] 2 R. at 302.

[74] *See, e.g.*, Hibernia Nat. Bank v. Belleville Historic Development, L.L.C., 815 So.2d 301, 305-306 (La.App. 4th Cir. 2002) ("[S]trict construction cannot be so interpreted as to permit purely technical objections to defeat the real intent of the statute, which is to protect materialmen, laborers and subcontractors who engage in construction projects.") (citing Bernard Lumber Company, Inc. V. Lake Forest Construction Co. Inc. 572 So.2d 178 (La. App. 1 Cir. 1990); Authement's Ornamental Iron Works v. Reisfeld, 376 So.2d 1061 (La. App. 4th Cir.1979); Morgan v. Audubon Const. Corp., 485 So.2d 529 (La. App. 5 Cir. 1986)) Norris Rader, Inc. v. Swilley, 625 So.2d 1125 (La. App. 3 Cir. 1993).

whether the worksite was reasonably identified so as to provide adequate notice of the claim and privilege to the owner, contractor and persons dealing with the owner.[75]

Applying the pertinent LPWA provisions, as we think the Louisiana Supreme Court would, we conclude that reasonable minds must find that Shaw preserved its claim and privilege by, *inter alia*, "reasonably identify[ing] the immovable with respect to which the work was performed . . . and the owner thereof."[76] The legal description identifies PCS's industrial tract on the Mississippi River with certainty according to surveys by a registered professional land surveyor with references including state plane coordinates, certain section corners, metes, bounds and identifiable landmarks. PCS does not dispute the fact that the 1265 Nitric Acid Facility was constructed at PCS's plant located within PSC's [sic] industrial river-front tract. It is also evident from the foregoing that the 1265 STPD Nitric Acid Facility is a substantial construction or edifice with a distinctive name located in PCS's plant on the clearly and certainly described river-front industrial tract. Consequently, we conclude that by furnishing the surveyor's legal property description – which described PCS's industrial tract on the Mississippi River, wherein PCS's plant was located, in which the distinctly named, substantial 1265 STPD Nitric Acid Facility was built – Shaw reasonably identified the property with respect to which the work was performed and the owner thereof. Thus, Shaw's statement of claim and privilege fulfills its purpose of "giv[ing] notice to the owner (and contractor) of the

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[75] *Id.*

[76] La. R.S.9:4822.G.(3).

existence of the claim and [gives] persons who may deal with the owner that a privilege is claimed on the property."[77] Because the "notice is adequate to serve the purposes intended" any "[t]echnical defects in the notice should not defeat the claim."[78]

PCS argues that Shaw did not reasonably identify the property where the work was done because the property description of PCS's river-front industrial tract was "too broad" to pin-point the site of the 1265 STPD Nitric Acid Facility. But the surveyor's description of PCS's unsubdivided industrial tract was the starting, not the ending, point. Additionally, because of the magnitude of the construction, the fact that the structure or building was called by its specific, distinctive name, and the undisputed fact that it was designed and built as an improvement to PCS's plant within the certainly described tract, there was a reasonable identification of the place where the work was done so as to give notice of the claim to persons who may deal with the owner that a privilege is claimed on the property. Because it was adequate to serve this purpose, its technical defects, if any, do not defeat the claim.

The cases upon which PCS relies are inapposite. *In re Lurgi-Knost, Inc.*, was a federal court decision predating the 1981 LPWA revision holding that a lien affidavit, stating that materials "were actually used in the construction of additions at the plant site [of] Enjay Chemical Co., Baton Rouge, Louisiana[,]" was too general to be effective because there was no legal description of the plant site, and "there is nothing in the affidavit to even vaguely

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[77] *Id.* Cmt. (G).

[78] *Id.*

indicate which building or structure and which lot or parcel of ground may be involved."[79] Shaw's affidavit, in contrast, specifies far more than the owner's plant in or near a certain city; it also provides a surveyor's detailed legal description of the parcel containing the owner's plant, and, in particular, names specifically the $38 million 1265 STPD Nitric Acid Facility edifice built at the plant with Shaw's labor, materials and services. Among other reasons, the lien in *Samedan Oil Corp. v. Ultra Fabricators, Inc.*, was invalid because the "steel structures" fabricated were not identified and there was "no block number or specific legal description" of the owner's property.[80] As we have explained, Shaw's claim and privilege does name the particular structure upon which the work was done and describes its location with reference to a specific legal description that includes specific sections, townships and ranges, among other identifiers. Finally, *Boes Iron Works v. Spartan Building Corp.*, is the most inapposite because it held a lien to be invalid on account of its identification of the property only by its municipal address.[81] Shaw, of course, did not place its reliance on a municipal address but used the multiple factors already described.

B.

Applying Section 4833 of the LPWA,[82] the magistrate court ruled that Shaw, without reasonable cause, failed to

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[79] 380 F.Supp. 400, 403 (M.D.La. 1974).

[80] 737 So.2d 846, (La. App. 3d Cir. 1999).

[81] 648 So.2d 24 (La. App.4th Cir. 1994).

[82] La. R.S. 9:4833.

cancel its claims and privileges in response to PCS's written request and assessed damages and attorneys fees against Shaw. After reviewing the record, however, we conclude that Shaw acted with reasonable cause and should not be taxed damages and attorneys fees.

The LPWA provides that, if a statement of claim or privilege is improperly filed, an owner may require the filing party to give written authorization for the recorder of mortgages to cancel the statement of claim or privilege from the records.[83] If the person who filed the statement of claim or privilege fails, without reasonable cause, to comply with the request within ten days, he shall be liable for damages suffered by the owner as a consequence and for reasonable attorney's fees incurred in obtaining cancellation.[84]

Shaw filed its claim and privilege on January 27, 1999 in Ascension and Iberville Parishes and its amended and supplemental claim and privilege in both parishes on February 27, 1999. On October 20, 2000 PCS's attorney sent Shaw's attorneys a letter demanding that Shaw cancel its claims and liens in both Ascension and Iberville parishes and dismiss this action with prejudice within 10 days. Shaw's attorney responded on October 26, 2000 that Shaw would not cancel its filings or dismiss this suit under the LPWA because, *inter alia*, Kaiser had materially breached the subcontract giving Shaw the right under Civil Code article 1982 to raise against PCS all defenses it could raise against Kaiser.

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[83] La. R.S. 9:4833.A.

[84] La. R.S. 9:4833.B.

In parts II & III of this opinion we conclude that, because Kaiser materially breached the Kaiser-Shaw subcontract, Shaw had a right under Civil Code articles 2013 et seq. to consider the subcontract dissolved and to be restored to its position before entering the subcontract; and Shaw had a right under Civil Code article 1982 to use these rights in defense against PCS. Thus, because Shaw was no longer obliged by the dissolved subcontract to refrain from filing liens or claims against PCS's property, Shaw had the right to file the statements of claim and privilege against PCS's property upon which Shaw's work was performed. Consequently, Shaw's claim and privilege were properly filed, and it had reasonable cause to refuse to cancel them from the mortgage records.

The magistrate court also decided, however, that Shaw should be assessed damages and attorney's fees because it acted unreasonably in failing to cancel its claim and lien in Iberville Parish because it knew that none of its work had been performed on PCS's property in the parish. But there is no support in the record or basis in law for the magistrate court's decision in this respect either. Because the Ascension-Iberville line runs through PCS's industrial tract and plant, Shaw did not know whether its work had been performed in one or both of these parishes.[85] Thus, when PCS filed a written request

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[85] The magistrate judge apparently concluded that PCS owned property on both sides of the river and that the nitric acid facility's location with respect to the river would have made clear to Shaw in which parish the work was done. R. at 0683. However, the legal description of the property establishes that the whole of the property in question is east of the river. The surveyor's description included in Shaw's statement of claim and privilege begins

Legal Description

(Continued on following page)

that Shaw cancel its claims and privileges in both parishes and dismiss its lawsuit on October 20, 2000, Shaw had reasonable cause to refuse to comply.

PCS did not send Shaw any other written request for cancellation of a claim or privilege. Therefore, Shaw was not called upon to consider making any response to a written request for cancellation other than PCS's October 20, 2000 in globo request. Consequently, Shaw was never without reasonable cause to refrain from cancelling any of its claims or privileges.

PCS's January 4, 2001 amendment of its counterclaim to allege that Shaw had refused to cancel its liens in both parishes and to pray for damages and attorney's fees cannot be considered as such a request because it related only to Shaw's rightful refusal to comply with PCS's October 20, 2000 request. Nor can we so consider PCS's subsequent filing of an affidavit by Robert D. Brinker, its Lead Process Supervisor, dated February 15, 2001 that "[t]he 1265 STPD Nitric Acid Facility is located [o]n a tract of land 160 feet x 180 feet, located exclusively in Ascension Parish." That instrument did not request Shaw to do anything. Moreover, Mr. Brinker's affidavit did not furnish Shaw with satisfactory proof that none of its work had taken place in Iberville Parish. According to his affidavit

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South Tract

A TRACT OF LAND LOCATED IN SECTIONS 74, 75, &T95-R/E SECTIONS 38, 39, & 40, T95-R2E, SOUTHEASTERN DISTRICT, *EAST OF MISSISSIPPI RIVER*, ASCENSION & IBERVILLE PARISH, LOUISIANA

(emphasis added) and the description of the north tract begins similarly. The parish line runs essentially perpendicular to the river, therefore the position of the nitric acid facility relative to the river would not, in and of itself, make clear in which parish the work was done.

Mr. Brinker is a "Lead Process Supervisor," not an attorney or a surveyor, and does not show that he is qualified to determine the position of the parish line with respect to PCS's plant or the 1265 STPD Nitric Acid Facility. Furthermore, the affidavit does not give any factual basis for such a determination by Mr. Brinker, does not show that Mr. Brinker's opinion as to the location of the parish line with respect to Shaw's work has a reliable basis, and does not contain a suitable legal description by which anyone could determine the location of the 160 feet x 180 feet tract conclusorily referred to by Mr. Brinker.

Conclusion

For the reasons assigned, we reverse the judgment of the magistrate court and instead render judgment in favor of Shaw and against PCS, on the issue of liability only, for the recognition of the validity of Shaw's claim and privilege under the LPWA against PCS personally, and against its property upon which Shaw's work was performed, for the amounts to be determined in further proceedings consistent with this opinion, and for the assessment of all costs of these proceedings against PCS.

Magistrate Court's Judgments REVERSED; Judgment RENDERED, on the issue of liability, recognizing Shaw's right to enforce its claim and privilege against PCS personally and against PCS's property upon which Shaw's work was performed, for amounts to be determined in further proceedings, and the assessment of all costs of these proceedings against PCS. REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

SHAW CONSTRUCTORS, INC.,
F/K/A UNITED CRAFTS, INC.
A SHAW GROUP COMPANY

VERSUS

CIVIL ACTION

ICF KAISER ENGINEERS, INC., AND PCS NITROGEN FERTILIZER, L.P., ET AL

NUMBER 99-254-C-1

RULING ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

(Filed Aug. 3, 2001)

This matter is before the court on a motion for partial summary judgment filed by plaintiff Shaw Constructors, Inc. (Shaw), record document numbers 31-33, 40, 41, and a motion for partial summary judgment filed by defendant PCS Nitrogen Fertilizer, L.P. (PCS), record document numbers 42-44, 46-51. Both motions are opposed.

This case involves the interpretation of a construction contract and the application of the Louisiana Private Works Act. Specifically, the court must decide whether a provision in a subcontract created a *stipulation pour autrui* – a benefit for a third party – in favor of PCS which is still enforceable against Shaw. If so, the court must then decide whether the *stipulation pour autrui* prohibited Shaw from filing a lien on PCS's property and bars Shaw's *in personam* claim against PCS under the Private Works Act. Because the material facts are undisputed, the court's role is to apply Louisiana law to those facts.

After doing so, the court concludes that the lien waiver provision in the subcontract executed by Shaw created a *stipulation pour autrui* in favor of PCS which is still enforceable. The court also concludes that Shaw waived its right to file a lien and claim pursuant to the Private Works Act, and that Shaw does not have an independent, *in personam* claim against PCS.

Undisputed Facts

The undisputed facts provide the background information necessary to understand and resolve the legal issues presented by the parties' motions for partial summary judgment.[1]

Defendant PCS entered into a contract with ICF Kaiser Engineers, Inc. and Henry J. Kaiser Company (Kaiser) to design and construct a project called the 1265 STPD Nitric Acid Facility at the PCS nitrogen plant near Geismar, Louisiana.[2] Kaiser did not furnish a bond and notice of its contract with PCS was not recorded. The contract between PCS and Kaiser provided in Section 5.3:

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[1] This summary of the undisputed material facts is based on a review of the statements of material facts and responses to those statements submitted by the parties, as well as the undisputed terms of the prime contract and subcontract. Record document numbers 32, 41, 43, 47, 48.

[2] "ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT BETWEEN PCS NITROGEN FERTILIZER, L.P. AND ICF KAISER ENGINEERS, INC. HENRY J. KAISER COMPANY; INC.," Plaintiff's Exhibit A (attached to affidavit of Douglas L. Fussell, executive vice-president of Shaw Constructors, Inc. since February 26, 1997).

> CONTRACTOR represents and warrants to OWNER, and covenants and agrees that the Plant, the Facility and the Work shall be at the time of Provisional Completion free and clear of any and all liens, security interests, charges, and encumbrances (collectively "Encumbrances") related to the Work.

Section 14.1 of the contract also provided as follows:

> CONTRACTOR shall immediately pay and discharge or shall provide security sufficient and satisfactory in itself to pay and discharge any obligations CONTRACTOR or any of its Subcontractors or Vendors may have, in respect of which any Encumbrances may be levied or is levied against the Work, the Plant, the Facility, the Site, the Complex, or the Owner Indemnified Parties. CONTRACTOR shall indemnify, defend and hold harmless the Owner Indemnified Parties from and against any such Encumbrance and any and all associated Losses. If at any time OWNER shall receive notice or information of the recording of any such Encumbrance or any evidence of any such Encumbrance which, if valid, would constitute a legal charge upon property of OWNER, the Plant, the Facility or any part thereof, it shall forthwith communicate the receipt of such notice, information or evidence to CONTRACTOR.

The very next provision, Section 14.2 states:

> If any such Encumbrance remains unsatisfied after the Date of Mechanical Completion, CONTRACTOR shall promptly refund to OWNER all amounts that OWNER my be compelled to pay in discharging any such Encumbrance.

Kaiser then subcontracted a portion of the construction project to Shaw, pursuant to a written subcontract.[3] The first paragraph of the subcontract between Kaiser and Shaw stated:

> This Subcontract is made pursuant to a Contract between PCS Nitrogen Company (hereinafter called "Owner") and ICF Kaiser Engineers, Inc. and Henry J. Kaiser Company (hereinafter called "Contractor") wherein Contractor agreed with Owner to provide 1265 STPD Nitric Acid Facility.

In section VI of the subcontract Shaw agreed to a provision entitled "*Waiver of Liens*":

> Subcontractor hereby agrees to and does waive his right to file any mechanic's liens or claims of any sort or kind against Owner's premises or any part thereof. Subcontractor further agrees to obtain a written waiver of the right to file any mechanic's liens or claims of any sort or kind against Owner's premises or any part thereof from any and all subcontractors, suppliers and materialmen at the time any subcontracts or purchase orders are issued in connection with the Work. In accordance with Article 25E of Exhibit "C", General Conditions for Subcontracts, a "Release and Waiver of Lien" in the form of Appendix 1-A thereto shall be executed by Subcontractor prior to release of each payment hereunder.[4]

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[3] Subcontract number 67856-3003. The subcontract was between Kaiser and United Crafts, Inc., A Shaw Group Company. Plaintiff's Exhibit B (attached to Fussell affidavit).

[4] *See*, copy of Appendix 1-A entitled "*RELEASE AND WAIVER OF LIEN*", record document number 46, Attachment A to Exhibit A attached to affidavit of Randall C. Gregory.

The new PCS nitric acid facility was constructed and eventually put into service.

After performing work pursuant to the subcontract, on January 27, 1999, Shaw filed and recorded two statements of claim, lien and privilege in the parishes of Iberville and Ascension against PCS.[5] Shaw recorded amended and supplemental lien affidavits and statements of claim and privilege against PCS in the same two parishes on February 17, 1999.[6]

On February 23, 1999, Shaw filed suit against PCS and Kaiser in state court and the action was removed to this court on March 18, 1999. Kaiser and Shaw entered into a COMPROMISE AGREEMENT.[7] The agreement required Kaiser to make payments to Shaw, but Shaw did not waive any claim it had against PCS.[8] After making partial payments to Shaw, Kaiser discontinued payments, leaving an unpaid balance of more than $2,000,000, and filed a bankruptcy proceeding. Shaw then pursued its claims against PCS which provoked these motions for summary judgment.

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[5] Mortgage book 324, entry 173, and mortgage book 0820, page 019, respectively.

[6] Mortgage book 325, entry 041, and mortgage book 824, page 299, respectively.

[7] COMPROMISE AGREEMENT, plaintiff's Exhibit E (attached to Fussell affidavit).

[8] Shaw agreed to dismiss its claims and this lawsuit against PCS if Kaiser executed the agreement and furnished replacement security for Shaw's liens, as provided in the COMPROMISE AGREEMENT. While Shaw did execute the COMPROMISE AGREEMENT, it did not provide the replacement security.

Motions for Summary Judgment

Shaw moved for partial summary judgment on the following grounds: (1) PCS is personally liable to Shaw under the Louisiana Private Works Act, LSA-R.S. 9:4801, et seq., for the unpaid work performed pursuant to the subcontract, because PCS did not require Kaiser to furnish a bond or record a notice of their contract; (2) PCS is not a third party beneficiary of, and may not enforce the waiver of liens provision of, Shaw's subcontract with Kaiser; (3) even if PCS is a third party beneficiary entitled to assert the waiver clause, Shaw only waived its right to assert *in rem* privileges against the property of PCS and did not waive *in personam* claims to hold PCS personally liable; (4) even if PCS is a third party beneficiary it cannot have greater rights than Kaiser would have against Shaw – since Kaiser breached its subcontract with Shaw, it could not enforce the waiver of liens clause so neither can PCS; (5) any *stipulation pour autrui* related to the waiver of lien clause in the subcontract was revoked or modified by Kaiser's admissions in this litigation and the subsequent compromise agreement between Kaiser and Shaw.

PCS also moved for partial summary judgment in its favor based on the following arguments: (1) as a third party beneficiary of the subcontract between Shaw and Kaiser, it is entitled to enforce the waiver of liens provision and have all claims asserted by Shaw in this lawsuit dismissed, along with cancellation of the inscription of all statements of claim and privilege and notices of lis pendens filed by Shaw; (2) alternatively, the statements of claim and privilege filed by Shaw must be cancelled because they encumber an area much larger than the area on which the subcontract work was performed, and therefore, are invalid under LSA-R.S. 9:4831.C.

Applicable Law

Summary judgment is only proper when the moving party, in a properly supported motion, demonstrates that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P.; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 2510 (1986). If the moving party carries its burden under Rule 56(c), the opposing party must direct the court's attention to specific evidence in the record which demonstrates that it can satisfy a reasonable jury that it is entitled to verdict in its favor. *Anderson,* 477 U.S. at 252, 106 S.Ct. at 2512. This burden is not satisfied by some metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions or only a scintilla of evidence. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994). In resolving the motion the court must review all the evidence and the record taken as a whole in the light most favorable to the party opposing the motion, and draw all reasonable inferences in that party's favor: *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513. The court may not make credibility findings, weigh the evidence, or resolve factual disputes. *Id.*; *International Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied,* 502 U.S. 1059, 112 S.Ct. 936 (1992).

The determination of whether a contract is clear or ambiguous is a question of law. *In re Combustion,* 960 F.Supp. 1076, 1079 (W.D. La. 1997). Because the proper interpretation of an unambiguous contract is a legal issue, it may appropriately be decided on a motion for summary judgment. *Boudreaux v. Unionmutual Stock Life Insurance Company of America,* 835 F.2d 121, 123 (5th Cir. 1988).

The substantive law dictates which facts are material. *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 439 (5th Cir. 2001). In this case the court must apply Louisiana's law applicable to interpretation of contracts, and third party beneficiaries, as well as the provisions of the Louisiana Private Works Act.

The principles of contract interpretation provided under the Louisiana Civil Code are well-established as are those governing third party beneficiaries.[9] Interpretation of a contract is the determination of the intent of the parties. Except for technical terms, the words of a contract must be given their generally prevailing meaning. Each provision must be read in light of the others so that each is given the meaning suggested by the contract as a whole. If the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent and the agreement must be enforced as written. Louisiana Civil Code Articles 2045, 2046, 2047, 2050.[10]

The Louisiana Civil Code provides that "[a] contracting party may stipulate a benefit for a third person called a third party beneficiary." Louisiana Civil Code Article

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[9] Although the subcontract stated (defendant's Exhibit A, "*GENERAL CONDITIONS FOR SUBCONTRACTS*," paragraph 40) that it was to be interpreted under Pennsylvania law, neither party advocated its application and both cited Louisiana law as controlling the issues to be resolved.

[10] *See, Williamson v. J. C. Penney Life Ins. Co.*, 226 F.3d 408, 409 (5th Cir. 2000) 7 *Adams v. Unione Mediterranea Di Sicurta*, 220 F.3d 659, 677-78 (5th Cir. 2000), *cert. denied*, ___ S.Ct. ___, 121 S.Ct. 1191 (2001).

1978. However, such a stipulation,[11] which in Louisiana case law is often referred to as a *stipulation pour autrui*, is never presumed.[12] The intent of the contracting parties to stipulate a benefit in favor of a third party must be made manifestly clear. *Chevron, U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1147 (5th Cir. 1993); *Davis Oil Co. v. TS, Inc.*, 145 F.3d 305, 311 (5th Cir. 1998). For there to be a *stipulation pour autrui* there must be not only a third party advantage, but the benefit derived from the contract by the third party may not merely be incidental to the contract. The third party benefit must form the condition or the consideration of the contract, and a *stipulation pour autrui* will be found only when the contract clearly reflects the benefit to the third person as its condition or consideration. *Id.*

The Louisiana Supreme Court has also adopted certain factors outlined by Smith in his article *Third Party*

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[11] *See*, J. Denson Smith, *Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 Tul.L.Rev. 18 (1936), In tracing the early history of the Louisiana law on third party beneficiaries, Smith noted that to stipulate meant to provoke a promise, therefore, to stipulate for another was to provoke a promise for another.

[12] " 'But inasmuch as people usually stipulate for themselves, and not for third persons, a strong presumption obtains in any given case that such was their intention; . . . ' " *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 468 (5th Cir.) (en banc), *cert. denied sub nom., Morial v. United States Gas Pipe Line Co.*, 469 U.S. 1019, 105 S.Ct. 434 (1984), *citing, Allen & Curry Mfg. Co., v. Shreveport Waterworks* Co., 113 La. 1091, 37 So. 980, 984 (1905).

A *stipulation pour autrui* is never presumed. People usually stipulate for themselves not for third persons. The existence of such a stipulation depends on the intention to create it. *Paul v. Louisiana State Employees' Group Ben. Program*, 762 So.2d 136, 140 (La. App. 1 Cir. 2000); *Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.*, 48 F.3d 927, 931 (5th Cir. 1995).

Beneficiaries in Louisiana. These factors are: (1) the existence of a legal relationship between the promisee and the third person involving an obligation owed by the promisee to the beneficiary which performance of the promise will discharge; (2) the existence of a factual relationship between the promisee and the third person, where (a) there is a possibility of future liability either personal or real on the part of the promisee to the beneficiary against which performance of the promisor will protect the former; (b) securing an advantage for the third person may beneficially affect the promisee in a material way; (c) there are ties of kinship or other circumstances indicating that a benefit byway of gratuity was intended.[13]

This case also involves the Louisiana's revised statutes known as the Private Works Act, LSA-R.S. 9:4801, et seq. Under LSA-R.S. 9:4802.A.(1), subcontractors have a claim against the owner and a claim against the contractor to secure payment for the price of their work. The claims against the owner are secured by a privilege on the immovable on which the work is performed. LSAR.S. 9:4802.B. The owner is relieved of the claims against him and the privileges securing them when the claims arise from the performance of a contract by a general contractor for whom a bond is given and maintained as required by LSA-R.S. 9:4812, and when notice of the contract with the bond attached is properly and timely filed as required by LSA-R.S. 9:4811. *See*, LSA-R.S. 9:4802.C.; LSA-R.S. 9:4811.A.; LSA-R.S. 9:4812.A.; LSA-R.S. 9:4831. A privilege given by R.S. 9:4801, a claim against the owner and the privilege securing it granted by R.S. 9:4802, or a claim

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[13] 11 Tul.L.Rev. at 58; *Liquid Drill*, 48 F.3d at 931; *Dartez v. Dixon*, 502 So.2d 1063, 1065 (La. 1987).

against the contractor granted by R.S. 9:4802 is extinguished if the claimant or holder of the privilege does not preserve it as required by R.S. 9:4822. LSA-R.S. 9:4823.A.(1).

The filing of a statement of a claim or privilege in accordance with LSA-R.S. 9:4822.C. is accomplished when it is filed for registry with the recorder of mortgages of the parish in which the work is to be performed. Each filing made with the recorder of mortgages which contains a reference to immovable property shall contain a description of the property sufficient to clearly and permanently identify the property. LSA-R.S. 9:4831.A. and C.

Analysis

Third Party Beneficiary

There is no dispute that Kaiser did not furnish a bond and that notice of the contract between PCS and Kaiser was not recorded. Under the Private Works Act Shaw would have the right to assert a claim and privilege against PCS as provided in LSA-R.S. 9:4802.A.(1). Hence, the critical issue at this juncture is whether PCS is a third party beneficiary of the waiver of liens and claims clause in the subcontract.

Defendant PCS argued that the subcontract evidences an express intent to confer a direct benefit upon it, and that it is entitled to third party beneficiary status. The first paragraph of the subcontract specifically states that the subcontract is made pursuant to the general contract between PCS and Kaiser, and the waiver clause itself refers to the owner and prohibits the filing of liens on its property – an obvious benefit to PCS. According to PCS,

the intent to benefit PCS found in the waiver of liens clause is supported by the indemnity provision, section 13 of the general conditions of the subcontract, in which Shaw agreed to indemnify, hold harmless and release PCS from any and all claims arising out of any acts by Shaw in connection with the subcontract or the work to be performed.[14]

In response, Shaw pointed out that the provisions of the contract between PCS and Kaiser clearly contemplated that the risk and financial burden associated with any liens or encumbrances would fall on Kaiser and not PCS.[15] Therefore, Shaw argued, these provisions of the prime contract make it clear that the intent and principal purpose of the waiver clause in the subcontract was to benefit Kaiser and any benefit to PCS was merely incidental. Finally, Shaw asserted that the waiver provision itself contains no clear expression of any intent to benefit PCS – PCS is not specifically identified as a third party beneficiary in the

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[14] Section 13.A. of *GENERAL CONDITIONS FOR SUBCONTRACTS* provided in pertinent part:

> Subcontractor shall indemnify, save harmless, release and at Owner's or Contractor's request, defend the Owner and Contractor, . . . from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, penalties, fines, costs and expenses of whatsoever kind or character, including but not limited to . . . , arising out of or by reason of any liability or obligation in any manner caused or occasioned or claimed to be caused or occasioned by, any act, omission, fault or negligence of Subcontractor or anyone acting on its behalf . . . , in connection with or incident to this Subcontract or the Work to be performed hereunder.

[15] Plaintiff's exhibit A, PCS/Kaiser contract, article 14.1.

subcontract, and there is no reference anywhere in the document to a third party beneficiary.

None of the cases cited by either party are particularly helpful in resolving this question.[16] Essentially, the resolution of the issue must turn upon the language of the contracts at issue and whether the waiver provision contained in the subcontract between Kaiser and Shaw expresses an intent that PCS be a third party beneficiary. A review of the relevant contractual provisions shows that the arguments of PCS are persuasive.[17]

The answer is found in the words of the contract itself.[18] Shaw expressly agreed to waive its right to file any liens or claims of any sort against the owner's premises. The subcontract clearly identifies PCS as the owner. It is difficult to conceive of a more direct conferral of a benefit to a party than for another party to state that it agrees to relinquish rights it could assert against that party in the absence of the stipulation. Shaw's argument that the subcontract does not mention the term third party beneficiary, or specifically state that PCS is a third party beneficiary, is

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[16] The court has reviewed all the cases cited by the parties on this issue. A lengthy summary and discussion of each one would not advance the analysis or resolution of the issue based on the particular facts and circumstances of this case.

[17] Shaw submitted the affidavit of Ronnie L. Volentine to support its position that it did not intend for PCS to be a third party beneficiary under the subcontract. Since the court finds that the terms of the contract are unambiguous, the affidavit was not considered.

[18] The court must look to the language of the agreements to determine whether the parties clearly contemplated the benefit to the third person as its condition or consideration. *Davis Oil,* 145 F.3d at 311 (5th Cir. 1998).

unavailing. The law does not require such specificity, only that the intent of the contracting parties to stipulate a benefit in favor of a third party is manifestly clear. That intent to benefit PCS is plainly expressed by the waiver clause included in the subcontract between Shaw and Kaiser.

This conclusion is also supported by other parts of the subcontract and the provisions of the PCS/Kaiser contract. The preamble of the subcontract identified PCS as the owner of the project and stated that the subcontract was made pursuant to the contract between PCS and Kaiser. Kaiser agreed in its contract to pay, discharge, or provide sufficient security to pay or discharge any encumbrances levied against the work, plant, facility, site, or owner-indemnified parties. Kaiser promised that at the time of provisional completion, the plant, facility and work would be free of any and all liens, security interests, charges, and encumbrances.[19] Since Kaiser promised that PCS's work, plant and facility would be free of liens and encumbrances, Kaiser wanted a promise for a similar benefit to PCS as a condition of the subcontract with Shaw. Because of Kaiser's agreement in the prime contract, the subcontract lien waiver provision benefitted both Kaiser and PCS. This arrangement does not render the benefit which Shaw unequivocally conferred upon PCS by agreeing to the condition any less apparent or direct.[20]

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[19] Plaintiff's exhibit A, PCS/Kaiser contract, articles 5.3, 14.1 and 14.2.

[20] "[T]here is nothing conflicting in the presence of a contemplated advantage for a third person in a contract which will enure also to the benefit of the promisee." *Merco Mfg., Inc. v. J.P. McMichael Const. Co.*, 372 F.Supp. 967, 974 D.C. La. 1974.

This conclusion is also supported by the factors often cited by Louisiana state and federal courts applying Louisiana's law applicable to third party beneficiaries.[21] There was clearly both a legal and factual relationship between Kaiser and PCS. This legal and factual relationship certainly encompassed the possibility of future liability of Kaiser to PCS, against which the performance of Shaw under the subcontract waiver clause would protect and beneficially affect Kaiser.

The Fifth Circuit decision in *T.J. King v. Employers National Ins. Co.*[22] is persuasive in the context of this case. In *King,* a plaintiff settled with several insurers. The written agreement stated that two insurers would pay, on the plaintiff's behalf, the entire lien of a workers' compensation insurer, which was not a party to the settlement agreement. All parties to the settlement also agreed to waive any claims and defenses they had against the workers' compensation insurer with respect to the lien. In resolving the issue of whether the workers' compensation insurer was a third party beneficiary of the waiver agreement, the court had no difficulty concluding that the language of the contract clearly intended the waiver for the benefit of the workers' compensation insurer. The court noted that the parties specifically named the workers' compensation insurer in the contract and granted it specific benefits. Therefore, any benefit to the worker's compensation insurer as a result of the waiver was not merely incidental. *King,* 928 F.2d at 1442.

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[21] *See*, page 10, footnote 13 of this ruling.

[22] 928 F.2d 1438 (5th Cir. 1991).

Shaw's argument that any *stipulation pour autrui* in favor of PCS was revoked before PCS could accept it is also without merit. Shaw contended that admissions contained in Kaiser's answer filed in this case, as well as the compromise agreement entered into between Kaiser and Shaw, effectively modified their rights and obligations under the subcontract and revoked any benefit stipulated in favor of PCS. However, the affidavit of J. Cabell Acree, III[23] and the letter supporting his affidavit show that in late February 1999 PCS expressed acceptance of any benefit in accordance with Louisiana Civil Code Articles 1978 and 1979.

These articles provide in pertinent part that "[t]he stipulation may be revoked only by the stipulator and only before the third party has manifested his intention of availing himself of the benefit." Louisiana Civil Code Article 1979. Additionally, the second paragraph of Article 1978 states that "[o]nce the third party beneficiary has manifested his intention to avail himself of the benefit, the parties may not dissolve the contract by mutual consent without the beneficiary's agreement." The comments to

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[23] Acree gave the affidavit based on his personal knowledge and in his position as senior counsel for PCS. He stated that he spoke to John Scott of Kaiser regarding the waiver of lien provision of the subcontract on or about February 26, 1999. He advised Scott that Kaiser should take no action which would waive or limit PCS third party beneficiary rights under the subcontract. Record document number 40, Acree affidavit, Exhibit A. The letter attached to Acree's affidavit supported the information contained in the affidavit. The letter was dated April, 8, 1999 and it was addressed to Scott from Acree. In this letter Acree specifically referred to "numerous occasions over the past several months" in which PCS made it clear to Kaiser that Kaiser should not take actions to waive or limit PCS third party beneficiary rights under the contract between Shaw and Kaiser.

these articles as well as the jurisprudence state that the third party beneficiary can manifest his intention to avail himself of the benefit in any manner, and may even be implied.[24] The statements contained in Acree's affidavit are uncontradicted by Shaw.[25] Based on these facts, the only reasonable inference is that by February 26, 1999, PCS had expressed its intention to accept the benefit of the waiver provision Kaiser secured from Shaw in the subcontract. The events Shaw contends rescinded any third party benefit to PCS all occurred after February 1999.[26] Since PCS had already manifested its intention of availing itself of the benefit, the stipulation in its favor could no longer be revoked.[27]

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[24] *See*, Article 1978, comment (b). *Mallet v. Thibault*, 31 So. 601, 604-05 (1947) (question whether stipulation for the advantage of a third person has been availed of is a question of fact which must be ascertained from contemporaneous and surrounding circumstances); *First State Bank v. Burton*, 73 So.2d 453, 458 (La. 1954); *Andrepont v. Acadia Drilling Co., Inc.*, 231 So.2d 347, 364 (La. 1969); *T. J. King*, 928 F.2d at 1442.

[25] Although Shaw's response to the statement of undisputed facts by PCS was to deny Acree's statements, Shaw offered no evidence to refute the information contained in his affidavit. Record document numbers 43 and 48, statement number 13.

[26] The compromise agreement was effective March 1, 1999, and Kaiser filed its answer and confession of judgment on May 4, 1999. Record document number 11.

[27] Article 1979, comment (b).

The acceptance by the third party is not an acceptance of an offer made to him, but a ratification of an agreement made in his favor. The jurisprudence shows that acceptance by the beneficiary does not have to be express but can be implied by actions of the beneficiary. Once the beneficiary has accepted the benefit, the stipulation cannot be revoked, unless the contract provides otherwise. Fred McGaha, *Third-Party Beneficiary Contracts*, 45 La.L.Rev. 797, 800-03 (1985).

Relying on Louisiana Civil Code Article 1982, which states that "[t]he promisor may raise against the beneficiary such defenses based on the contract as he may have raised against the stipulator," Shaw argued that PCS cannot claim the benefit or demand enforcement of the lien waiver clause. Shaw reasoned that because Kaiser acknowledged through its answer and confession of judgment that it breached the subcontract, Kaiser cannot now demand that Shaw perform its obligations and so neither can PCS. Shaw asserted that for PCS to do so it would be claiming better rights than Kaiser.

Shaw's argument must be rejected. Article 1981 grants both the stipulator and the third party beneficiary the right to demand performance. Under the second part of the article, if Kaiser demanded performance it would be doing so not for itself but for PCS.[28] By exercising its equal right under article 1981 to claim the benefit of the stipulation, PCS cannot be exercising greater or better rights than Kaiser. Interpreting article 1982 as suggested by Shaw in the context of this case, would negate the right of PCS under articles 1978 and 1981 to accept and demand performance of the *stipulation pour autrui*. Shaw cites no authority or persuasive arguments to support such a result.[29]

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[28] Article 1981 provides:

> "The stipulation gives the third party beneficiary the right to demand performance from the promisor.
>
> Also, the stipulator, **for the benefit of the third party**, may demand performance from the promisor." (Emphasis added.)

[29] Shaw cited only one case in support of its arguments, *Brandon v. Duncan*, 22 La.Ann. 360 (La. 1870). This case is not controlling or

(Continued on following page)

Interpretation of Waiver Provision

Since PCS is a third party beneficiary of Section VI of the subcontract, the only remaining issue is the interpretation of that provision. Shaw asserted that the clause is ambiguous and only addressed *in rem* obligations, and did not even mention its *in personam* claims against PCS. Thus, any *in personam* claim it has to hold PCS personally liable was unaffected by any waiver of its *in rem* lien rights contained in Section VI of the subcontract. Shaw argued that this interpretation of the contract is supported by the provisions of the Private Works Act which make a distinction between *in rem* and *in personam* rights. According to Shaw both the statute and cases establish that *in personam* claims under the Private Works Act exist independently of *in rem* claims and may be asserted separately.

Shaw's arguments are unconvincing. Shaw essentially attempts to create an ambiguity in the contract and the law where none exists.[30] Neither the terms *in rem* or *in personam*, nor terms meaning the same things, are found in either the subcontract or the Private Works Act. The lien waiver clause clearly and unequivocally states: "Subcontractor hereby agrees to and does waive his right to file any mechanics liens or claims of any sort or kind against Owner's premises or any part thereof."[31] It is

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persuasive. The facts are not similar to the present case, and the court did not find that the contract contained a *stipulation pour autrui*.

[30] Because the court finds the relevant language unambiguous, affidavits or other information relied upon by Shaw was not considered in interpreting the waiver provision.

[31] Shaw did not dispute that a party may validly waive its rights, including lien rights. Record document number 46, pp. 23, 24.

undisputed that Shaw filed and recorded statements of claim, lien and privilege in Iberville and Ascension parishes against PCS, and amended and supplemental lien affidavits and statements of claim and privilege against PCS in the same two parishes.[32] The liens and claims were filed against the property owned by PCS.[33] Thus, Shaw filed liens and asserted claims against PCS which it had promised not to do.

Shaw conceded that its claims against PCS are based solely on rights created by the Private Works Act, and that under the act the privilege granted to it is accessory to and secures the personal liability of the owner under the act. Under sections 4802 and 4823, a claim against the owner and the privilege securing it are extinguished if not preserved by the filing of a statement of claim and privilege in accordance with section 4822. Thus, it follows that a personal claim against the owner cannot be preserved or is lost if there is a failure or inability to file the statement of claim, lien or privilege under section 4822.[34] Shaw cited no authority for interpreting section 4802 to provide that the owner continues to be personally liable even if there is no privilege or lien against his property as provided in section 4822, nor any authority for the argument that the

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[32] Record document number 32, Shaw's statement of material facts as to which there is no issue to be tried, numbers 10 and 11.

[33] Plaintiff's Exhibits C and D (attached to Fussell affidavit).

[34] Under the law prior to 1981, the personal liability of the owner for the obligations of his contractors or their subcontractors and the privilege on the immovable were provided for separately. The rewriting in 1981 "makes it clear that the privilege given under this section [R.S. 9:4802.B] is accessory to and only secures the personal liability of the owner imposed by Subsection A." *See*, LSA-R.S. 9:4802, comment (c).

act gives subcontractors a claim and privilege which are independent rights that may be asserted separately.[35]

Shaw's reliance on the Act's preservation of rights provisions is also unavailing.[36] Essentially, these parts of the statute preserve any rights or claims a contractor or subcontractor may have, such as contractual rights, in addition to those provided in the Act. Again, Shaw cites no authority that these parts of the statute are interpreted or intended to allow subcontractors to separately preserve or pursue their right against the owner and the owner's property.

Conclusion

The lien waiver clause in Section VI of the subcontract between Kaiser and Shaw contains a *stipulation pour autrui* for the benefit of PCS. Before any revocation by Shaw or Kaiser, PCS manifested its intention to avail itself of the benefit of the lien waiver provision. Therefore, Louisiana Civil Code Article 1981 gives PCS the right to demand performance from Shaw of the obligation created by the waiver and to require that Shaw cancel its liens.

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[35] The cases cited by Shaw did not involve facts similar to the present case, and were in large part decisions rendered under the law as it existed prior to the 1981 revision of the Private Works Act.

The Exposé des Motifs preceding the 1981 revision explained that under the statute before the revision, it was possible to have situations where the owner might not be personally bound but his property would be bound for claims arising out of a contract between third persons, and vice versa. In restating the law in 1981, one of the major changes noted by the reporter was suppressing the separate privileges and personal liability given by R.S. 9:4812.

[36] LSA-R.S. 9:4802.D. and comment (e); LSA-R.S. 9:4823.C.

Finally, because the Private Works Act creates no separate *in personam* claim which Shaw can assert against PCS in these circumstances, and Shaw had no contractual privity with PCS, PCS cannot be liable to Shaw for the amount remaining due from Kaiser.

Accordingly, the motion for partial summary judgment filed by the plaintiff Shaw Constructors, Inc. is denied. The motion for partial summary judgment filed by defendant PCS Nitrogen Fertilizer, L.P. is granted.

Baton Rouge, Louisiana, August 3, 2001.

/s/ Stephen C. Riedlinger
STEPHEN C. RIEDLINGER
UNITED STATES
MAGISTRATE JUDGE

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL., 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

January 12, 2005

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 02-30183 Shaw Constructors v. ICF Kaiser Engineers USDC No. 99-CV-254-C

The court has granted an extension of time to and including 01/27/05 for filing a petition for rehearing in this case.

You are reminded that we must actually receive any petition for rehearing in this office by the due date.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Kim Folse
Kim Folse, Deputy Clerk
504-310-7712

Mr. Eric A Kracht
Mr. Eugene R Preaus

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30183

SHAW CONSTRUCTORS

Plaintiff – Appellant-Cross-Appellee

v.

ICF KAISER ENGINEERS INC; ET AL

Defendants

PCS NITROGEN FERTILIZER L P

Defendant – Appellee-Cross-Appellant

Appeals from the United States District Court for the Middle District of Louisiana, Baton Rouge

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Feb. 16, 2005)

(Opinion 12/30/04, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, GARZA, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

REHG-4A

La. Civil Code Article 1979. Revocation

The stipulation may be revoked only by the stipulator and only before the third party has manifested his intention of availing himself of the benefit.

If the promisor has an interest in performing, however, the stipulation may not be revoked without his consent.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

La. Civil Code Article 1982. Defenses of the promisor

The promisor may raise against the beneficiary such defenses based on the contract as he may have raised against the stipulator.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

La. Civil Code Article 2005. Secondary obligation

Parties may stipulate the damages to be recovered in case of nonperformance, defective performance, or delay in performance of an obligation.

That stipulation gives rise to a secondary obligation for the purpose of enforcing the principal one.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

La. Civil Code Article 2015. Dissolution after notice to perform

Upon a party's failure to perform, the other may serve him a notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time allowed for that purpose must be reasonable according to the circumstances.

The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

Revision Comments – 1984

* * *

(c) Under this Article, an obligee who, upon the obligor's failure to perform, chooses to regard the contract as dissolved under revised C.C. Art. 2013 (Rev.1984), *supra*, must give the obligor a notice to perform. This requirement is consistent with the overriding obligation of good faith in those situations where, under the revised articles on putting in default, the obligor falls automatically in default without any act of the obligee. See revised C.C. Art. 1990 (Rev. 1984), *supra*. The notice to perform must be given in the manner described in revised C.C. Art. 1991 (Rev. 1984), *supra*, for a valid putting in default.

(d) The giving of a notice to perform under this Article has the same effect as a putting of the obligor in default for the purpose of calculating delay damages. After such notice is given, the obligor will be liable for any delay

damages that accrue. If the obligor is already in default at the time the notice to perform is given, of course, the delay damages accrue from the time he fell in default and not from the time of the notice to perform. Under revised C.C. Art. 1990 (Rev.1984), *supra*, the obligor is put in default by the mere passage of the time for performance, and damages for delay start running then. In such a case, the notice to perform need be given only because it is a prerequisite to the obligee's exercising his right to regard the contract as dissolved. If time is of the essence, no such notice is needed according to the following Article.

La. Civil Code Article 2016. Dissolution without notice to perform

When a delayed performance would no longer be of value to the obligee or when it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without any notice to the obligor.

Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.

Revision Comment – 1984

This Article is new. It does not change the law, however. Louisiana courts have established that a putting in default is not necessary when the obligor has communicated an intention not to perform, or in a situation where time is of the essence. See Allen v. Steers, 39 La.Ann. 586, 2 So. 199 (1887); Abels v. Glover, 15 La.Ann. 247 (1860); Kinsell & Locke, Inc. v. Kohlman, 12 La.App. 575, 126 So. 257 (La.App. Orl.1930). Since under C.C. Art. 1912 (1870) putting in default is also a prerequisite to dissolution of a contract, the cited decisions amount to judicial recognition

that dissolution may be had without a prior putting in default in the contemplated situations.

La. R.S. 9:4802 Improvement of immovable by contractor; claims against the owner and contractor; privileges securing the improvement

A. The following persons have a claim against the owner and a claim against the contractor to secure payment of the following obligations arising out of the performance of work under the contract:

(1) Subcontractors, for the price of their work.

(2) Laborers or employees of the contractor or a subcontractor, for the price of work performed at the site of the immovable.

(3) Sellers, for the price of movables sold to the contractor, or a subcontractor that become component parts of the immovable, or are consumed at the site of the immovable, or are consumed in machinery or equipment used at the site of the immovable.

(4) Lessors, for the rent of movables used at the site of the immovable and leased to the contractor or a subcontractor by written contract.

(5) Prime consultant registered or certified surveyors or engineers, or licensed architects, or their professional subconsultants, employed by the contractor or a subcontractor, for the price of professional services rendered in connection with a work that is undertaken by the contractor or subcontractor.

(a) A "professional subconsultant" means a registered or certified surveyor or engineer, or licensed architect employed by the prime consultant.

(b) For the privilege under this Subsection to arise, a prime consultant or professional subconsultant shall give written notice to the owner within thirty working days after the date that the prime consultant or professional subconsultant is employed. The notice shall include the name and address of the prime consultant or professional subconsultant, the name and address of his employer, and the general nature of the work to be performed by the prime consultant or professional subconsultant.

B. The claims against the owner shall be secured by a privilege on the immovable on which the work is performed.

C. The owner is relieved of the claims against him and the privileges securing them when the claims arise from the performance of a contract by a general contractor for whom a bond is given and maintained as required by R.S. 9:4812 and when notice of the contract with the bond attached is properly and timely filed as required by R.S. 9:4811.

D. Claims against the owner and the contractor granted by this Part are in addition to other contractual or legal rights the claimants may have for the payment of amounts owed them.

E. A claimant may assert his claim against either the contractor, his surety, or the owner without the joinder of the others. The claim shall not be subject to a plea of discussion or division.

F. A contractor shall indemnify the owner for claims against the owner arising from the work to be performed under the contract. A subcontractor shall indemnify the owner, the contractor, and any subcontractor from or

through whom his rights are derived, for amounts paid by them for claims under this part arising from work performed by the subcontractor.

G. (1) For the privilege under this Section to arise, the lessor of the movables shall deliver a copy of the lease to the owner and to the contractor not more than ten days after the movables are first placed at the site of the immovable for use in a work.

(2) For the privilege under this Section or R.S. 9:4801(3) to arise, the seller of movables shall deliver a notice of nonpayment to the owner at least ten days before filing a statement of his claim and privilege. The notice shall be served by registered or certified mail, return receipt requested, and shall contain the name and address of the seller of movables, a general description of the materials provided, a description sufficient to identify the immovable property against which a lien may be claimed, and a written statement of the seller's lien rights for the total amount owed, plus interest and recordation fees. The requirements of this Paragraph (G)(2) shall apply to a seller of movables sold for use or consumption in work on an immovable for residential purposes.

(3) In addition to the other provisions of this Section, if the seller of movables has not been paid by the subcontractor and has not sent notice of nonpayment to the general contractor and the owner, then the seller shall lose his right to file a privilege or lien on the immovable property. The return receipt indicating that certified mail was properly addressed to the last known address of the general contractor and the owner and deposited in the U.S. mail on or before seventy-five days from the last day of the month in which the material was delivered, regardless of

whether the certified mail was actually delivered, refused, or unclaimed satisfies the notice provision hereof or no later than the statutory lien period, whichever comes first. The provisions of this Paragraph shall apply only to disputes arising out of recorded contracts.

La. R.S. 9:4807 Contractor, general contractor, subcontractor defined

A. A contractor is one who contracts with an owner to perform all or a part of a work.

B. A general contractor is a contractor:

(1) Who contracts to perform all or substantially all of a work; or

(2) Who is deemed to be a general contractor by R.S. 9:4808(B).

C. A subcontractor is one who, by contract made directly with a contractor, or by a contract that is one of a series of contracts emanating from a contractor, is bound to perform all or a part of a work contracted for by the contractor.

L.A. R.S. 9:4823 Extinguishment of claims and privileges

A. A privilege given by R.S. 9:4801, a claim against the owner and the privilege securing it granted by R.S. 9:4802, or a claim against the contractor granted by R.S. 9:4802 is extinguished if:

(1) The claimant or holder of the privilege does not preserve it as required by R.S. 9:4822; or

(2) The claimant or holder of the privilege does not institute an action against the owner for the enforcement of the claim or privilege within one year after the expiration of the time given by R.S. 9:4822 for filing the statement of claim or privilege to preserve it; or

(3) The obligation which it secures is extinguished

B. A claim against a contractor granted by R.S. 9:4802 is not extinguished by the failure to file a statement of claim or privilege as required by R.S. 9:4822 if a statement of the claim or privilege is delivered to the contractor within the period allowed for its filing by R.S. 9:4822. The failure to file an action against the owner as required by R.S. 9:4823(A)(2) shall not extinguish a claim against a contractor if an action for the enforcement of the claim is instituted against the contractor or his surety within one year after the expiration of the time given by R.S. 9:4822 for filing the statement of claim or privilege to preserve it.

C. The extinguishment of a claim or privilege shall not affect other rights the claimant or privilege holder may have against the owner, the contractor, or the surety.

D. A privilege granted by this Part is extinguished if a bond is filed by the owner as provided by R.S. 9:4835.

E. A claim against the owner and the privilege securing it granted by this Part are extinguished if a bond is filed by the contractor as provided by R.S. 9:4835.

F. In a concursus proceeding brought under R.S. 9:4841, the joinder of the owner and a person who has a

privilege or a claim against the owner, or the joinder of the contractor or surety and a person who has a claim against the contractor constitutes the institution of an action for the enforcement of the claim or privilege against the owner, contractor, or surety as the case may be.

ENGINEERING, PROCUREMENT
AND CONSTRUCTION AGREEMENT

BETWEEN

PCS NITROGEN FERTILIZER, L.P.

AND

ICF KAISER ENGINEERS, INC.

HENRY J. KAISER COMPANY, INC.

* * *

ARTICLE 5 – CERTAIN CONTRACTOR RESPONSIBILITIES

* * *

5.3 CONTRACTOR represents and warrants to OWNER, and covenants and agrees, that the Plant, the Facility, and the Work shall be at the time of Provisional Completion free and clear of any and all liens, security interests, charges, and encumbrances (collectively, "Encumbrances") related to the Work.

* * *

ARTICLE 10 – PROCUREMENT

* * *

10.2 CONTRACTOR may subcontract portions of the Work to Subcontractors preapproved in writing by OWNER; provided that (i) CONTRACTOR shall remain responsible for the performance of the Work in accordance with the terms and conditions of this Agreement; and (ii) OWNER shall not have any obligations under subcontracts entered into by CONTRACTOR. CONTRACTOR shall be solely responsible for the engagement, management and payment of any such Subcontractors. CONTRACTOR

shall pay such Subcontractors all amounts owned when due.

* * *

ARTICLE 14 – LIENS

14.1 CONTRACTOR shall immediately pay and discharge or shall provide security sufficient and satisfactory in itself to pay and discharge any obligation CONTRACTOR or any of its Subcontractors or Vendors may have, in respect of which any Encumbrance may be levied or is levied against the Work, the Plant, the Facility, the Site, the Complex, or the Owner Indemnified Parties. CONTRACTOR shall indemnify, defend and hold harmless the Owner Indemnified Parties from and against any such Encumbrance and any and all associated Losses. If at any time OWNER shall receive notice or information of the recording of any such Encumbrance or any evidence of any such Encumbrance which, if valid, would constitute a legal charge upon property of OWNER, the Plant, the Facility or any part thereof, it shall forthwith communicate the receipt of such notice, information or evidence to CONTRACTOR.

14.2 If any such Encumbrance remains unsatisfied after the Date of Mechanical Completion, CONTRACTOR shall promptly refund to OWNER all amounts that OWNER may be compelled to pay in discharging any such Encumbrance.

* * *

[LOGO] **ICF KAISER**
ICF KAISER ENGINEERS, INC

SUBCONTRACT

Subcontract No.: 67856-3003
Date: January 16, 1998
1265 STPD Nitric Acid Plant
PCS Nitrogen Company, Geismar LA
SC-4 Piping and Mechanical Equipment
SC-6 Absorption Tower and Stack Erection
SC-9 Underground Piping

This Subcontract is made pursuant to a Contract between PCS Nitrogen Company (hereinafter called "Owner") and ICF Kaiser Engineers, Inc. and Henry J. Kaiser Company (hereinafter called "Contractor") wherein Contractor agreed with Owner to provide 1265 STPD Nitric Acid Facility.

Contractor and UNITED CRAFTS, INC., A SHAW GROUP COMPANY (hereinafter called "Subcontractor") hereby agree that Subcontractor shall perform faithfully all obligations of Subcontractor as set forth in this Subcontract and in the documents listed on Attachment A, which documents are incorporated herein by reference and which documents together with this Subcontract are hereinafter called "Subcontract Documents".

I. SCOPE OF WORK:

Subcontractor shall furnish all labor, materials, tools, equipment services, supervision and transportation required to detail, furnish, fabricate, deliver, and install at Owner's Jobsite, Geismar Louisiana, Piping and Mechanical Equipment Installation, Absorption Tower and Stack Erection, and Underground Piping, complete and in

accordance with Exhibit "A", Specification No. 67856-9950-1166, Rev 1, dated 5/26/98, 67856-9950-1168, Rev 2, dated 7/21/98, and 67856-9960-1113, all Rev. 3 dated 7/21/98 together with the other Subcontract Documents as further set forth herein.

II. COMPENSATION:

In consideration of the faithful performance of all Subcontractor's obligations hereunder, Contractor shall pay to Subcontractor the Firm Fixed Price of $5,063,882.00 (not subject to escalation), per the following breakdown:

III. FIXED, SEPARATED PRICE BREAKDOWN:

Description	Material	Labor	Equipment	Total
1. Piping Supply and Installation	TBD	TBD	TBD	$3,622,491
2. Equipment Installation	TBD	TBD	TBD	$482,498
3. Absorption Tower and Stack Erection	TBD	TBD	TBD	$574,945
4. Underground Piping (Cooling Tower)	TBD	TBD	TBD	$156,513
5. On-Site Administrator	TBD	TBD	TBD	$15,000
6. Mob/ Demobilization				$30,000
7. Sub-Total:	TBD	TBD	TBD	$4,881,447
8. LA Sales Tax @ 8% on Material				$149,600

9. 100% Performance Bond (1%)				$32,835
10. **TOTAL**	TBD	TBD	TBD	$5,063,882

NOTES: 1. Pricing includes $15,000.00 for a "full-time" Administrator for the administration of changes associated with revised drawings.

2. Detailed, Fixed, Separated Price Breakdown to be provided by Subcontractor with return of executed Subcontract.

IV. TERMS OF PAYMENT:

1. Monthly progress, less 10% retention, NET 45 days from invoice date, provided Subcontractor secures Contractor's field approval and delivers said invoice(s) to Contractor's Pittsburgh, PA facility no later than the 15th day of the 45-day period.

2. Retention to be released upon final acceptance of Contractor or December 1, 1998, whichever occurs first.

3. Invoice per the "EDNC Subcontractor Invoice Procedure", Attachment C.

V. COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK:

Subcontractor shall commence, perform and complete his obligations in accordance with the Subcontract Documents per the following schedule:

- Release to Proceed: January 16, 1998
- Large bore fittings: 12-14 weeks ARO delivery with 6 weeks fabrication, plus 12 weeks on-site installation.

- Required On-Site Date: March 16, 1998
- Completion Date: July 17, 1998
- NOTE: Contractor and Subcontractor acknowledge the importance of completing this project by June 30, 1998, based on Subcontractor's best efforts; however, completion shall not exceed July 17, 1998.
- **Construction Schedule** – The Subcontract was awarded on January 16, 1998, with a Required On-Site Date of March 16, 1998 and a Completion Date of July 17, 1998. The Piping Fabrication and Installation Subcontract – Addendum PCS Nitrogen Company – Geismar, LA ICF Kaiser Contract No. 67856 Equipment Milestones, Items 1. (30 April 98) through 39. (19 May 98). The Piping Fabrication and Installation Subcontract PCS Nitrogen Company – Geismer, LA ICF Kaiser Contract No. 67856 Milestones, Items 1. (30 April 98) through 34. (17 July 98), the Absorption Tower, Appurtenances and Stack Subcontract PCS Nitrogen Company – Geismer, LA ICF Kaiser Contract No. 67856 Equipment Milestones, Revision 1, items 1. (4 Feb 98) through 10. (30 Jun 98) and the Isometric Drawing Issue Milestones make up Exhibit "J" and are the four (4) documents that comprise the Subcontract Schedule agreed-upon by both Contractor and Subcontractor.

VI. WAIVER OF LIENS:

Subcontractor hereby agrees to and does waive his right to file any mechanic's liens or claims of any sort or kind against Owner's premises or any part thereof. Subcontractor further agrees to obtain a written waiver of the right to file any mechanic's liens or claims of any sort or kind against Owner's premises or any part thereof from any

and all subcontractors, suppliers and materialmen at the time any subcontracts or purchase orders are issued in connection with the Work. In accordance with Article 25E of Exhibit "C", General Conditions for Subcontracts, a "Release and Waiver of Lien" in the form of Appendix 1-A thereto shall be executed by Subcontractor prior to release of each payment hereunder.

VII. BOND REQUIREMENTS:

Subcontractor shall provide with the executed Subcontract a Performance and Payment Bond naming ICF Kaiser Engineering Company and PCS Nitrogen Company co-obligees and proof of insurance for Builder's Risk. Cost of said bond will be paid by Contractor. Said bond will be in amount equal to 100% of Subcontract price and shall be procured through sureties and insurance brokers or agents as may be acceptable to Contractor. In addition to any other rights which Contractor may have, Subcontractor's failure to deliver acceptable bond, shall release Contractor from any obligation of any nature whatsoever to Subcontractor by virtue of Contractor's acceptance of Subcontractor's Proposal.

VIII. SPECIAL PROVISIONS:

A. Changes – Article 23 of Exhibit "C", General Conditions for Subcontracts, refers to Contractor's right to make changes, additions and/or deletions to the work. The value of such changes shall be determined in one of the following ways at the sole option of Contractor.

1. By unit prices, as specified in the Subcontract, Exhibit "H", which include overhead and profit.

2. By lump sum which must be substantiated by detailed estimate with the Subcontractor's and lower tier subcontractor's (if applicable) fee for overhead and profit figures as follows:

   a) When the work is performed by Subcontractor's own forces, Subcontractor may add to the cost of the change an amount equal to 10% of the labor cost and 10% of the material cost as Subcontractor's total compensation for overhead and profit.

   b) When the work is performed by a lower tier subcontractor's forces, the lower tier subcontractor may add to the cost of the change an amount equal to 10% of the labor cost and 10% of the material cost as the lower tier subcontractor's total compensation for overhead and profit. Subcontractor may then add 10% for Subcontractor's overhead and profit.

3. By time and material rates as follows:

   a) Labor Exhibit "I-1"

   No overhead and profit will be paid on premium portion of overtime labor.

   b) Materials

   Cost to Subcontractor (after rebates, discounts, returns and similar credits) of all materials used in the performance

or the work hereunder plus *10%* handling allowance.

c) Equipment

(i) Subcontractor shall be reimbursed at the rates for equipment owned by Subcontractor per Exhibit "I-2".

(ii) All rental rates shall include fuel, oil, grease, and maintenance. Operators' wages shall be reimbursed under Section 1 (Labor) above.

B. Clarifications to Subcontract:

1. Subcontract pricing is based on a normal forty (40) hour work week. Access to the jobsite to be coordinated with Contractor's onsite Construction Manager.

2. Coverages for any liabilities arising out of, or associated with the performance of the proposed scope of work which would normally be covered by Builder's Risk Insurance and/or an Installation Floater, will be provided by United Crafts, Inc., with associated premiums reimbursable at cost.

3. All work shall be accomplished in a continuous manner. Additional move-in's have not been included.

4. Any liquidated damages associated with the Contract between Contractor and Owner are not included in the Subcontract.

5. Subcontract pricing includes monies for a 100% Performance and Payment Bond. Any work added to the Subcontract will require a 100% Performance and Payment Bond to cover the additional work. Costs of such

additional bonding will be reimbursable by Contractor to Subcontractor, at Subcontractor's invoiced cost.

6. Subcontract pricing includes only those items as depicted on the Contractor Furnished Drawings. Additional items, not shown on the Detail Drawings, in Contractor provided quantities, or specified as included in the Subcontractor Clarifications, have not been included in the Subcontract pricing. Items not included will be installed per Exhibit "H" pricing, or on a Cost Plus 10% reimbursable basis if not covered in Exhibit "H".

7. For the purposes of this Subcontract, periodic test drills shall not be considered to be reimbursable delay events by Contractor.

8. Under no circumstances shall Subcontractor supply nor install any supports whose design was not furnished by Contractor.

IX. ADDRESSES:

All notices, demands, requests, or other communications which this Subcontract requires or permits shall be sent to the addresses as listed below:

SUBCONTRACTOR:
UNITED CRAFTS, INC.,
a Shaw Group Company
15556 Perkins Road
Baton Rouge, LA 70810
Attn: William Clouatre
Title: Vice President
Phone: 504/752-2515
Fax: 504/752-1272

CONTRACTOR:
ICF KAISER ENGINEER, INC.
Gateway View Plaza, 1600 West Carson Street
Pittsburgh, PA 15219
Attn: Bonnie L. Marsh, C.P.M.
Title: Purchasing Agent
Phone: 412/497-2024
Fax: 412/497-2244

IN WITNESS WHEREOF, the parties hereto have executed this Subcontract as of the date of first above written.

SUBCONTRACTOR:
BY: /s/ Ronnie Valentine for/ Douglas Fussell
TITLE: General Manager/ Executive Vice President

CONTRACTOR:
BY: /s/ Bonnie L. Marsh
Bonnie L. Marsh, C.P.M.
TITLE: Purchasing Agent

BY: /s/ R. E. Yester
Russell E. Yester
TITLE: Purchasing Manager

List of Attachments:

Attachment A:	List of Exhibits
Attachment B:	Distribution List
Attachment C:	PCS Subcontractor Invoice Procedure
Appendix 1-A:	Release and Waiver of Lien

SUBCONTRACT NUMBER 67856-3003
ATTACHMENT A – LIST OF EXHIBITS

EXHIBIT "A"	Specification Nos. 67856-9950-1166, Rev. 1, dated 5/26/98, 67856-9950-1168, Rev. 2, dated 7/21/98, and 67856-9960-1113, Rev. 3, dated 7/21/98 Clarifications to Technical Requirements
EXHIBIT "B"	Document Record (N/A)
EXHIBIT "C"	General Conditions for Subcontracts Clarifications to General Conditions for Subcontracts
EXHIBIT "D"	Insurance Requirements & Certificate
EXHIBIT "E"	General Safety Rules (ICF Kaiser)
EXHIBIT "F"	Contractor Safety Performance History (N/A)

EXHIBIT "G"	ICF Kaiser Subcontractor Safety and Health Requirements for Performing Work at PCS Nitrogen Company
EXHIBIT "H"	Unit Price Breakdown Clarifications to Unit Pricing
EXHIBIT "I"	1. Labor Billing Rates 2. Equipment Rental Rates
EXHIBIT "J"	1. Piping Fabrication and Installation Subcontract Equipment Milestones 2. Piping Fabrication and Installation Subcontract Milestones 3. Absorption Tower, Appurtenances and Stack Equipment Milestones, Revision 1 4. Isometric Drawing Issue Milestones

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SUBCONTRACT NUMBER 67856-3003
ATTACHMENT B – DISTRIBUTION LIST

1. COMMERCIAL INFORMATION

All correspondence to:

ICF Kaiser Engineers, Inc.
Gateway View Plaza
1600 West Carson Street
Pittsburgh, PA 15219

Attn: Bonnie L. Marsh, C.P.M.
Purchasing Agent
Phone: 412/497-2024
Fax: 412/497-2244

With copy to:

Attn: R. Stofko
Project Manager
Phone: 412/497-2262
Fax: 412/497-2182

Attn: W. Hansen
Project Design Engineer
Phone: 412/497-2048
Fax: 412/497-2182

2. TECHNICAL INFORMATION

ICF Kaiser Engineers, Inc.
Gateway View Plaza
1600 West Carson Street
Pittsburgh, PA 15219

Attn: W. Hansen
Project Design
Engineer
Phone: 412/497-2048
Fax: 412/497-2182

With copy to:

Attn: R. Stofko
Project Manager
Phone: 412/497-2262
Fax: 412/497-2182

3. DATA SUBMITTALS

Drawings, Manuals, etc., to:

ICF Kaiser Engineers, Inc.
Gateway View Plaza
1600 West Carson Street
Pittsburgh, PA 15219

Attn: David Abijanac
Phone: 412/497-2014
Fax: 412/497-2182

With copy of transmittals to:

Attn: R. Stofko
Project Manager
B.L. Marsh
Purchasing Agent
W. Hansen
Project Design
Engineer

4. JOBSITE

PCS Nitrogen Company
% ICF Kaiser Engineers
Louisiana Highway 3115
and 30
Geismar, LA 70734

Attn: Joel Rivers
On-Site Construc-
tion Manager
Phone: 504/642-6185
Fax: 504/642-6189

SUBCONTRACT NUMBER 67856-3003
ATTACHMENT C
PCS SUBCONTRACTOR INVOICE PROCEDURE

Subcontractor shall:

1. Create a separate invoice for *each* progress billing, Change Order, and/or FTM, which shall contain, as a minimum, the following information:

    - Subcontractor's corporate name, address, phone/ fax numbers, contact name, Invoice No., date of Invoice
    - ICF Kaiser Subcontract Number (67856-3003) and Change Order Number, if applicable
    - project name (i.e., Installation of . . .)
    - total amount of Subcontract value
    - a recap of the amounts previously billed
    - invoiced amounts separated into each of the "SEPARATED PRICE BREAKDOWN" categories outlined below (show "$0.00" if no value or not applicable)
    - attach back-up documentation, such as signed time sheets, FTM's, invoices, unit prices, quantities, etc., to support calculations for all invoiced amounts (illustrate calculations)
    - include a completed Appendix 1-A, "Release and Waiver of Lien", for each invoice (form attached)

2. Submit each invoice to Joel Rivers, PCS On-Site Construction Manager, Geismar LA (Phone: 504-642-6185) for On-Site approval and signature.

3. Forward Site-approved invoices to the following address for further processing/payment. Failure to

follow these invoicing instructions may result in a payment delay.

ICF Kaiser Engineers, Inc.
1600 West Carson Street
Gateway View Plaza
Pittsburgh, PA 15219
Attention: Karen Roach
Accounts Payable
Phone: 412-497-2131
Fax: 412-497-2244

SEPARATED PRICE BREAKDOWN:

	Description	Material	Labor	Equipment	Rental Equip.	Total
1.		$	$	$	$	$
2.		$	$	$	$	$
3.		$	$	$	$	$
4.	SUB-TOTAL:	$	$	$	$	$
5.	*LA Sales Tax @ 8% on Material & Rental Equipment*					$
6.	100% Performance Bond (X%)					$
7.	TOTAL:					$

APPENDIX 1-A

RELEASE AND WAIVER OF LIEN

SUBCONTRACT NO. 67856-3003

TO: PCS NITROGEN COMPANY (OWNER)

and ICF KAISER ENGINEERS, INC. (CONTRACTOR)

Pursuant to the terms of Subcontract No. 67856-3003 and in consideration of the sum of $_____ which has been or is to be paid to the undersigned as partial payment in accord with said Subcontract, the undersigned upon payment of said sum:

(1) accepts said amount as partial payment under the Subcontract and acknowledges that with receipt of said partial payment, the undersigned has been paid in full for any and all compensation payable under the provisions of Subcontract No. 67856-3003, including all amendments, modification, and/or change orders thereto;

(2) fully releases and discharges OWNER and CONTRACTOR and each of them, and any officer, employee or agent of either, from any and all claims, demands, causes of action of every kind and nature arising directly or indirectly out of said Subcontract;

(3) certifies that its subcontractors and all parties who have performed work, labor, services, or supervision, or who have furnished material, equipment, machinery, tools or supplies in, on or in connection with any of the work covered by said Subcontract, or any amendment, modification or change order thereto, whether pursuant to oral agreement, written Contract, purchase order, or otherwise have been paid in full, and further pursuant to the payment Article of Exhibit "C" of said Subcontract

agrees to furnish to OWNER or CONTRACTOR upon demand, such evidence of payment thereof as may be reasonably required;

(4) for themselves and on behalf to their agents, servants, employees, Subcontractors and/or others furnishing labor, material or services, forever waives and relinquishes any and all liens, stop notices, levies and attachments and all other rights to claim or file the same which they or any of them may now or hereafter have against OWNER and/or CONTRACTOR or the properties of either, whether known or unknown, arising out of or in any way connected with the performance of Subcontract No. 67856-3003.

The following listed items shall be excepted from the operation of this release:

Undersigned further certifies that in the event OWNER and/or CONTRACTOR may in the future be called upon to pay for or defend against any liens, claims or demands of any kind arising out of the work required to be performed under said Subcontract which undersigned is obligated to pay and discharge, undersigned will indemnify and save and hold harmless OWNER and CONTRACTOR from and against any such payment or defense, including reasonable attorneys fees and costs incurred in connection therewith, and will at the request of OWNER and/or CONTRACTOR and at their own expense take over and assume the defense and liability for any such lien, claim or demand.

Undersigned further reconfirms the provisions of the inspection and acceptance Article of Exhibit "C" of said Subcontract that the payments made hereunder shall not

in any manner be or constitute an acceptance of defective or improper materials of workmanship.

DATED THIS ___ day of _____, 19___.

UNITED CRAFTS, INC., A SHAW GROUP COMPANY
(Subcontractor)

By _____

Title _____

Amended and Supplemental Lien Affidavit
And Statement of Claim And Privilege

(Original Lien Affidavit filed January 27, 1999
Mortgage Book 0820 Page 019)

(Filed Feb. 17, 1999)

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, personally came and appeared:

> SHAW CONSTRUCTORS, INC. F/K/A UNITED CRAFTS, INC. A SHAW GROUP COMPANY (hereinafter "SHAW"), a Louisiana corporation, whose address is 15556 Perkins Road, Baton Rouge, LA 70801, appearing through its Executive Vice President, Douglas F. Fussell;

who did depose and state as follows:

1. I have personal knowledge of all facts stated in this Amended and Supplemental Lien Affidavit; and all facts stated herein are true and correct. I am authorized to execute this document on behalf of SHAW CONSTRUCTORS, INC. F/K/A UNITED CRAFTS, INC. A SHAW GROUP COMPANY. A purpose of this filing is to amend and supplement the original Lien Affidavit filed January 27, 1999 Mortgage Book 0820 Page 019.

2. ICF KAISER ENGINEERS, INC., AND HENRY J. KAISER COMPANY, whose address is Gateway View Plaza, 1600 West Carson Street, Pittsburgh, PA 15219 (General Contractor) entered into a contract with the Owners of certain property, believed to be PCS NITROGEN COMPANY AND/OR PCS NITROGEN FERTILIZER, L.P. F/K/A ARCADIAN FERTILIZER, L.P. AND/OR PCS NITROGEN FERTILIZER, INC.

AND/OR PCS NITROGEN, INC. AND/OR POTASH CORPORATION OF SASKATCHEWAN INC. (Owners) whose address is Louisiana Highway 3115 and 30, Post Office Box 307, Geismar, LA 70734, to provide labor, equipment, materials and other construction services for the construction of a project called "1265 STPD NITRIC ACID FACILITY."

3. On or about January 16, 1998, SHAW (Subcontractor) entered into a subcontract with ICF KAISER ENGINEERS, INC., AND HENRY J. KAISER COMPANY (General Contractor) to provide labor, equipment, materials and other services including, but not limited to, civil/structural construction, mechanical equipment installation, piping fabrication and piping erection for the "1265 STPD NITRIC ACID FACILITY." Pursuant to said subcontract, SHAW supplied labor, equipment, materials and other engineering/construction services to ICF KAISER ENGINEERS, INC., AND HENRY J. KAISER COMPANY to improve the immovable property described in paragraph 4, below.

4. The subject immovable property, upon which the work was performed, is owned by ARCADIAN FERTILIZER, L.P. AND/OR PCS NITROGEN, INC. AND/OR PCS NITROGEN COMPANY AND/OR PCS NITROGEN FERTILIZER, L.P. F/K/A ARCADIAN FERTILIZER, L.P. AND/OR PCS NITROGEN FERTILIZER, INC. AND/OR POTASH CORPORATION OF SASKATCHEWAN INC. which immovable property is further described on *Exhibit A* attached hereto and made a part hereof.

5. After all credits are applied, there remains presently due and owing an unpaid balance of $5,350,000.00. plus interest, for the labor, materials, equipment and other engineering/construction services provided by SHAW as described above, under the terms of the subcontract. Said sum does not include lost profits or delay damages.

6. This Affidavit is made, filed and delivered to the parties pursuant to the Louisiana Private Works Act, La. R.S. 9:4801 *et seq.* for the purposes of (a) preserving SHAW's claims against the owner(s) of the property described herein; and (b) securing SHAW's privilege on the immovable property on which the work is performed.

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary, in Baton Rouge, Louisiana, on this, the 16th day of February 1999.

SHAW CONSTRUCTORS, INC. F/K/A UNITED CRAFTS INC. A SHAW GROUP COMPANY

By: /s/ Douglas F. Fussell
Executive Vice-President
Shaw Constructors, Inc

/s/ NOTARY PUBLIC

SHAW CONSTRUCTORS, INC.	NUMBER 51,792 DIV. D
VERSUS	18TH JUDICIAL DISTRICT COURT
ICF KAISER ENGINEERS, INC., AND PCS NITROGEN FERTILIZER, L.P., ET AL.	PARISH OF IBERVILLE STATE OF LOUISIANA

Petition

The petition of Shaw Constructors, Inc., (*f/k/a* United Crafts, Inc. A Shaw Group Company), a Louisiana corporation domiciled in East Baton Rouge Parish, Louisiana (hereinafter referred to as "Shaw") respectfully represents:

1.

Made defendants herein are:

A. ICF Kaiser Engineers, Inc., a foreign corporation, authorized to do and doing business in Louisiana;

B. Henry J. Kaiser Company, a foreign corporation, authorized to do and doing business in Louisiana;

(ICF Kaiser Engineers, Inc and Henry J. Kaiser Company are sometimes referred to collectively as "Kaiser");

C. PCS Nitrogen Fertilizer, L.P. (*a/k/a or f/k/a* "Arcadian Fertilizer, L.P.") a foreign limited partnership authorized to do and doing business in Louisiana;

D. PCS Nitrogen Fertilizer, Inc., a foreign corporation;

E. PCS Nitrogen, Inc., a foreign corporation; and

F. Potash Corporation of Saskatchewan Inc., a foreign corporation;

(PCS Nitrogen Fertilizer, L.P. (*a/k/a or f/k/a* "Arcadian Fertilizer, L.P.") and PCS Nitrogen Fertilizer, Inc. and PCS Nitrogen, Inc. and Potash Corporation of Saskatchewan Inc. are sometimes referred to collectively as "PCS Nitrogen").

2.

Kaiser (as "Contractor") entered into a contract with PCS Nitrogen (as "Owner") to design and construct a project referred to as the *1265 STPD Nitric Acid Facility* (hereinafter "the Project") at the PCS Nitrogen facility near Geismar, Louisiana.

3.

Kaiser and Shaw entered into a contract styled "Subcontract No. 67856-3003" dated January 16, 1998 (hereinafter the "Subcontract"). Under the Subcontract, Shaw agreed to provide labor, equipment, materials and other construction services including, but not limited to, civil/structural construction, mechanical equipment installation, piping fabrication, and piping erection. Shaw's work was to be performed at "Owner's Jobsite, Geismar, Louisiana." Kaiser agreed to pay Shaw $5,063,882 for the work specified in the Subcontract.

4.

Shaw began work at the owner's jobsite in Geismar, Louisiana, on March 9, 1998. During Shaw's performance of its work under the Subcontract. Kaiser made changes

and additions thereto which increased Shaw's costs of performance and delayed Shaw's completion.

5.

On or about October 5, 1993, Kaiser and Shaw entered into an agreement styled "Subcontract Change Order No. 1," which amended the Subcontract. In material part, that agreement changed the scope of work and modified the payment provisions of the original Subcontract.

6.

Under the Subcontract, as amended, Kaiser agreed to make payments to Shaw within 45 days after receipt of Shaw's invoices.

7.

As Shaw's work on the Project progressed, Kaiser failed to make timely payments as specified in the Subcontract. As a result of Kaiser's material breach of the Subcontract, Shaw considered suspending work and/or terminating the Subcontract, and so advised Kaiser.

8.

On January 12, 1999, representatives of Shaw and Kaiser met and agreed to a "Recovery Plan" the purpose of which was to induce Shaw to continue its performance of the subject Subcontract and another contract on a separate project. Under the "Recovery Plan", Kaiser agreed, among other things, to make a series of scheduled payments to

Shaw, (which included certain interest penalties on past due amounts and other late payments) and to obtain a payment bond to secure payment for the remainder of Shaw's work on the Project. Kaiser also acknowledged there there [sic] was no dispute as to Shaw's entitlement to full payment of all invoices rendered by Shaw, as of that date.

9.

In reliance upon Kaiser's promises under the "Recovery Plan" Shaw continued work on the Subcontract and incurred additional costs. Kaiser performed a portion of its obligations under the "Recovery Plan" but failed to make all payments in accordance therewith, failed to obtain a payment bond, and failed to make full payment for Shaw's work.

10.

On or about January 26, 1999, while Kaiser stood in material breach of both the Subcontract and the "Recovery Plan", Kaiser unilaterally and in bad faith terminated the Subcontract and directed Shaw to discontinue work at the jobsite.

11.

The work, materials and services provided by Shaw pursuant to the Subcontract, prior to its termination, had a price and value of $11,442,864. Of that amount, Kaiser has paid only $6,392,827, leaving a balance of $5,050,037. Despite amicable demand, Kaiser has failed and refused to pay Shaw for those sums which are due and payable under the Subcontract.

12.

In addition to the sums earned under the Subcontract, and the contractually agreed upon interest thereon, Shaw is entitled to recover the profit it would have earned on the remaining work under the Subcontract, had Kaiser not terminated the Subcontract.

13.

On January 27, 1999, Shaw filed and recorded a *Statement of Claim, Lien and Privilege* in Mortgage Book 324. Entry 173 of the official records of Iberville Parish. On February 17, 1999, Shaw recorded an *Amended and Supplemental Lien Affidavit and Statement of Claim and Privilege* in Mortgage Book 325, Entry 041. Copies of those documents are annexed hereto and made a part hereof as *Exhibit A* and *Exhibit B*, respectively.

14.

Copies of *Exhibit A* were sent to PCS Nitrogen via certified mail. PCS Nitrogen received copies of *Exhibit A.* Copies of *Exhibit B* were sent to Kaiser and PCS Nitrogen via Certified Mail.

15.

The owner(s) of the property whereon Shaw's work was performed did not require its general contractor to furnish and maintain a bond as required by La. R. S. 9:4812, nor did the owner(s) file (or cause to be filed) a proper and timely notice of the contract (with bond attached) as required by La. R. S. 9:4811.

16.

Pursuant to the Private Works Act. La. R. S. 9:4801 *et. seq.* Shaw has a claim against the owner(s) of the property whereon the work was performed for the price of its work. Shaw's claim against the owner(s) is secured by a privilege on the immovable on which its work was performed.

17.

The tract of immovable property upon which Shaw's work was performed (more particularly described in Exhibits A and B) is situated in two parishes; namely, Iberville Parish and Ascension Parish. Shaw alleges on information and belief that the owner(s) of the property on which its work was performed is (are) PCS Nitrogen Fertilizer, L.P. (*a/k/a or f/k/a* "Arcadian Fertilizer, L.P."), and/or PCS Nitrogen Fertilizer, Inc. and/or PCS Nitrogen, Inc. and/or Potash Corporation of Saskatchewan Inc.

18.

The owner(s) of the subject property are indebted to Shaw for the unpaid portion of the Subcontract price, $5,050,037, together with legal interest from due date until paid, plus the costs of filing the statements of claim and privilege, plus all costs and attorney's fees expended for the establishment and enforcement of its claim and privilege, and for all other costs of these proceedings.

19.

Kaiser is indebted to Shaw for the sum of $5,050,037, together with contractually agreed upon interest from due date until paid, and for all damages, foreseeable or not,

attributable to Kaiser's bad faith breach of its contractual obligations (including but not limited to lost profits), and for all other costs of these proceedings.

WHEREFORE, Shaw Constructors, Inc. prays for judgment in its favor, and against ICF Kaiser Engineers, Inc., Henry J. Kaiser Company, PCS Nitrogen Fertilizer, L.P. (*f/k/a* Arcadian Fertilizer, L.P.), PCS Nitrogen Fertilizer, Inc., PCS Nitrogen, Inc. and Potash Corporation of Saskatchewan Inc., for such damages as are reasonable in the premises, together with interest from due date until paid, reasonable attorney's fees and for all costs of these proceedings.

Shaw Constructors, Inc. further prays for judgment in its favor recognizing and enforcing its privilege upon and against the immovable property upon which its work was performed, as described in Exhibits A and B annexed hereto.

By Attorneys:

Patrick W. Pendley, A.P.L.C.
58005 Meriam Street
P.O. Box 71
Plaquemine, LA 70765-0071
phone (225) 687-6396
fax (225) 687-6398

/s/ Patrick W. Pendley
Patrick W. Pendley
Bar Roll No. 10421
Pamela M. Pendley
Bar Roll No. 23546
Attorneys for Shaw Constructors, Inc.

Wray & Kracht, L.L.P.
5643 Corporate Boulevard
P.O. Box 80239
Baton Rouge, LA 70898-0239
phone (225) 928-3200
fax (225) 928-3266

/s/ Eric A. Kracht
Eric A. Kracht
Bar Roll No. 7912
David W. Carley
Bar Roll No. 25607
Attorneys for Shaw Constructors, Inc.

Please Serve:

ICF Kaiser Engineers, Inc.
through is registered agent
for service of process
Corporation Service Company
320 Somerulos Street
Baton Rouge, LA 70802-6129

Henry J. Kaiser Company
through is registered agent
for service of process
Corporation Service Company
320 Somerulos Street
Baton Rouge, LA 70802-6129

PCS Nitrogen Fertilizer, L.P.
(*a/k/a or f/k/a* "Arcadian Fertilizer, L.P.")
through is registered agent
for service of process
CT Corporation System
8550 United Plaza Blvd.
Baton Rouge, LA 70809

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

SHAW CONSTRUCTORS, INC., F/K/A/ UNITED CRAFTS, INC. A SHAW GROUP COMPANY	CIVIL ACTION NO. 99-254 SECTION "C"
VERSUS	JUDGE TYSON
ICF KAISER ENGINEERS, INC., AND PCS NITROGEN FERTILIZER, L.P., ET AL	MAGISTRATE JUDGE (1)

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO ISSUE TO BE TRIED

Plaintiff-mover Shaw Constructors, Inc. (hereinafter "Shaw"), in support of its *Motion for Partial Summary Judgment* and in compliance with LR 56.1, provides the following statement of material facts as to which the moving party contends there is no issue to be tried:

1. On or about September 17, 1997, PCS Nitrogen Fertilizer, L.P. (hereinafter referred to as "PCS" or "Owner") entered into a contract (with an effective date of November 1, 1996) with ICF Kaiser Engineers, Inc. and Henry J. Kaiser Company (collectively referred to as "Kaiser" or "General Contractor"), to design and construct a project referred to as the *1265 STPD Nitric Acid Facility* (hereinafter "Project") at PCS's Nitrogen Facility near Geismar, Louisiana. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 3.*

2. Kaiser subcontracted a portion of the Project work to Shaw pursuant to a written contract styled "*Subcontract No. 67856-30*" dated January 16, 1998 (hereinafter "Subcontract"). Kaiser furnished the entire text of the Subcontract which, to affiant's knowledge, was one of Kaiser's standard forms.

3. Under the Subcontract, as amended, Shaw provided labor, equipment, materials and other construction services including, but not limited to, civil/structural construction, mechanical equipment installation, piping fabrication, and piping erection at PCS's nitrogen plant, which is situated in the Parishes of Ascension and Iberville, Louisiana. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 4; Kaiser's Answer and Confession of Judgment, paragraph 2.*

4. PCS is the owner of the immovable property upon which Shaw's work was performed. The tract of land whereon Shaw's work was performed is located in two parishes, namely Ascension and Iberville. *PCS's Answer and Counterclaim, paragraph 17.*

5. PCS did not require its contractor (Kaiser) to furnish and maintain a bond, as contemplated by La. R. S. 9:4812, nor did PCS file (or cause to be filed) a proper or timely notice of the contract as contemplated by La. R. S. 9:4811. *PCS's Answer and Counterclaim, paragraph 15.*

6. Shaw's last work on the project was performed on or about February 1, 1999. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 6.*

7. Neither PCS nor Kaiser recorded a "notice of termination of the work" as contemplated by La. R. S. 9:4822.

8. The project (including the work of Shaw) was substantially completed on or about April 1, 2000. Shortly thereafter, PCS placed the facility into service. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 7.*

9. Kaiser failed to pay Shaw for those sums which were earned, due and payable under the Subcontract. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine,*

paragraph 8; Kaiser's Answer and Confession of Judgment, paragraph 2.

10. On January 27, 1999, Shaw filed and recorded a *Statement of Claim, Lien and Privilege* in Mortgage Book 324, Entry 173 of the official records of Iberville Parish. On February 17, 1999, Shaw recorded an *Amended and Supplemental Lien Affidavit and Statement of Claim and Privilege* in Mortgage Book 325, Entry 041 of Iberville Parish. (Copies of those documents are annexed to Shaw's *Petition* as *Exhibit A* and *Exhibit B*, respectively). *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 9; Kaiser's Answer and Confession of Judgment, paragraph 2; PCS's Answer and Counterclaim, paragraph 13.*

11. On January 27, 1999, Shaw filed and recorded *a Statement of Claim, Lien and Privilege* in Mortgage Book 0820, Page 019 of the official records of Ascension Parish. On February 17, 1999, Shaw recorded an *Amended and Supplemental Lien Affidavit and Statement of Claim and Privilege* in Mortgage Book 824, Page 299 of Ascension Parish. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 10.*

12. Copies of the *Statements of Claim and Privilege* described above were sent to Kaiser and PCS via certified mail and PCS received copies of same. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 11; Kaiser's Answer and Confession of Judgment, paragraph 2; PCS's Answer and Counterclaim, paragraph 14.*

13. On February 23, 1999, Shaw filed suit against PCS and Kaiser in the 18th Judicial District Court. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 12.*

14. On February 26, 1999, Shaw filed and recorded a *Notice of Pendency of Action* in Mortgage Book 826,

Entry Number 431763 of the official records of Ascension Parish. On February 25, 1999, Shaw filed and recorded a *Notice of Pendency of Action* in Mortgage Book 325, Entry 130 of the official records of Iberville Parish. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 13.*

15. On March 1, 1999, Shaw and Kaiser entered into an agreement styled *Compromise Agreement* wherein Kaiser and Shaw agreed, *inter alia*, as follows:

    a. All work performed by Shaw under the subcontract (and amendments thereto) had been completed by Shaw in accordance with the applicable plans, specifications and contract documents, and had been accepted by Kaiser and PCS.

    b. Kaiser acknowledged and agreed that the sum of $5,238,217.90, representing the unpaid price and valuable work performed by Shaw at the PCS project, was due and payable to Shaw under the subcontract.

    c. Kaiser agreed to pay Shaw 20 equal monthly installments of $291,012.11 each, beginning on May 15, 1999 and continuing through December 15, 2000.

    d. Shaw's liens affecting the Project would be subject to cancellation as follows:

        (1) Kaiser could file a bond or other security in conformity with the requirements of the Private Works Act (particularly La. R. S. 9:4835), whereupon Shaw would acknowledge that all liens and notices of lis pendens affecting the Project had been canceled thereby; or

(2) Kaiser could furnish to Shaw a Letter of Credit in a form acceptable to Shaw in the amount of $5,300,000, payable upon demand in the event of any default by Kaiser of any of its obligations under this agreement; whereupon Shaw would furnish a conventional release and cancellation of all liens and notices of lis pendens affecting the Project.

(3) Should Kaiser fail to furnish either a bond or letter of credit as substitute security for its liens, Shaw's liens, privileges and claims against PCS would remain in place and would be unaffected by the terms of the agreement.

See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 14.

16. Kaiser made eleven (11) of the twenty (20) partial payments to Shaw (pursuant to the payment terms of the *Compromise Agreement*) for work Shaw performed under the Subcontract totaling $3,201,133.21. Kaiser failed to make any additional payments. The unpaid debt owed by Kaiser to Shaw as of December 15, 2000, amounts to $2,037,084.77. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 15.*

17. On June 19, 2000, Shaw made written demand upon Kaiser to cure its default in payment. Kaiser failed to cure said default, and has made no further payment to Shaw. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine,, paragraph 16.*

18. Shaw never waived or released its claims against PCS for PCS's personal liability to Shaw. *See Affidavit(s) of Douglas L. Fussell and Ronnie L. Volentine, paragraph 17.*

19. During the negotiation, execution or administration of the Subcontract there was never any discussion that PCS was (or would be) a third party beneficiary under the Subcontract. The only parties to the Subcontract were Shaw and Kaiser. *See Affidavit of Ronnie L. Volentine, paragraph 18.*

20. Shaw did not intend for PCS to be a third party beneficiary under the Subcontract. *See Affidavit of Ronnie L. Volentine, paragraph 19.*

BY ATTORNEYS:

KRACHT & GRAVES, L.L.P.
5643 Corporate Boulevard
Post Office Box 14299
Baton Rouge, Louisiana 70898-4299
(225) 926-1550-*Office*
(225) 926-1540-*Facsimile*

/s/ E.A. Kracht
Eric A. Kracht, T.A.
Louisiana Bar Roll No. 7912
David W. Carley
Louisiana Bar Roll No. 25607
Attorneys for Shaw Constructors, Inc.

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing has been duly served upon all parties, through counsel of record, by depositing same into the United States Mail, properly addressed and postage prepaid.

Baton Rouge, Louisiana, this 22nd day of January, 2001.

/s/ EA Kracht

No. 02-30183

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHAW CONSTRUCTORS, INC.
Plaintiff-Appellant, Cross-Appellee

v.

ICF KAISER ENGINEERS, INC., ET AL
Defendants

PCS NITROGEN FERTILIZER, L.P.
Defendant-Appellee, Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF
SHAW CONSTRUCTORS, INC.
PLAINTIFF-APPELLANT, CROSS-APPELLEE

KRACHT & ASSOCIATES, L.L.C.
5643 Corporate Boulevard
Post Office Box 14299
Baton Rouge, LA 70898
Telephone: 225/924-4080
Facsimile: 225/924-4081

* * *

VI. ISSUES PRESENTED FOR REVIEW

Shaw asserts that the District Court erred in its denial of Shaw's motion for partial summary judgment as to the *in personam* liability of PCS. The District Court further erred in its entry of summary judgment in favor of PCS which dismissed Shaw's suit, ordered the cancellation of Shaw's statements of claim and privilege, and assessed

damages against Shaw in the sum of $61,614.68 plus interest and costs. Shaw respectfully submits the following issues for the Court's review on appeal:

Issue One: The "Waiver of Liens" clause in the Subcontract between Kaiser and Shaw is not a *Stipulation Pour Autrui* which can be enforced by PCS.

Issue Two: Even if the "Waiver of Liens" Clause Were a *Stipulation Pour Autrui,* PCS Cannot Assert Any Greater or Better Rights than Kaiser.

Issue Three: Even if the "Waiver of Liens" Clause is a *Stipulation Pour Autrui* Which Can Be Enforced by PCS – Free of Shaw's Defenses – it Should Not Be Construed as an Advance Waiver of Future Claims.

Issue Four: The "Waiver of Liens" Clause Did Not Effect an Extinguishment of the *in Personam* "Claim" Granted to Shaw under the Louisiana Private Works Act La. R.S. 9:4801 *et seq* (the "Act").

Issue Five: Shaw Was Entitled to Rely upon the Legal Description of the Property Contained in the Public Records.

Issue Six: Shaw Had *Reasonable Cause* to Refuse to Authorize Cancellation of its Statements of Claim and Privilege, and Therefore Should Not Have Been Cast for Attorneys Fees.

* * *

No. 02-30183

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHAW CONSTRUCTORS, INC.
Plaintiff-Appellant, Cross-Appellee

v.

ICF KAISER ENGINEERS, INC., ET AL
Defendants

PCS NITROGEN FERTILIZER, L.P.
Defendant-Appellee, Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

SECOND BRIEF ON BEHALF OF
SHAW CONSTRUCTORS, INC.
PLAINTIFF-APPELLANT, CROSS-APPELLEE

Eric A. Kracht, LBR#7912(T.A.)
Scott E. Frazier, LBR# 18601
KRACHT & ASSOCIATES, L.L.C.
5643 Corporate Boulevard
Post Office Box 14299
Baton Rouge, LA 70898
Telephone: 225/924-4080
Facsimile: 225/924-4081

* * *

A. Shaw Is Entitled to Assert Kaiser's Breach of the Subcontract As A Defense To PCS's Efforts to Enforce It

In support of its first argument (that Shaw may not assert Kaiser's breach of the Subcontract as a defense to PCS's effort to enforce the *Waiver of Liens* clause) PCS has

cited no Louisiana authorities. Because neither legislation nor jurisprudence of this state provides support for this argument, PCS relies exclusively upon Illinois case law for the notion that a breach of contract (or other failure of consideration) does not render a lien waiver unenforceable. *See Jankoviak v. Butcher*, 159 N.E.2d 377, 378-379 (Ill. App.2d Dist. 1959) (cited by PCS). That tenet of Illinois law is inconsistent with the law of Louisiana and other states as well.[15]

The principle embodied in *Jankoviac* [sic], *supra*, is directly at odds with Louisiana's Civil Code, which describes the consequences of contract breaches. Article 2022 thereof provides that *"either party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously."* Further, when an obligor fails to perform, the obligee has the right to seek judicial dissolution of the contract, or *"may regard the contract as dissolved."* In either case, the obligee may recover damages for the breach. La. C.C. art. 2013. Thus, if a contract contains an agreement by the obligee not to file a lien (which would benefit the obligor), that clause could not be enforced by the defaulting obligor,

---

[15] For example, in a Texas case, *Murray v. Crest Construction, Inc.*, 900 SW 2d 342 (Tex. Sup. Ct.,1995), a dispute arose over the contractor's obligation to make payments to the plaintiff-subcontractor. The parties agreed to a settlement under which the subcontractor executed a "waiver of lien" in exchange for a promissory note. When the contractor refused to pay the full amount of the note, the subcontractor filed a lien. The court did *not* enforce the lien waiver, but held that because the contractor breached (repudiated) their agreement, the subcontractor *"was under no obligation to honor the waiver of lien."*

inasmuch as the obligee could regard that clause (*i.e.* the entire contract) as "dissolved."

A somewhat analogous circumstance was addressed by the court in *North Development Co., Inc. vs. McClure*, 276 So.2d 395 (La.App. 2d Cir. 1973). A subcontractor (McClure) brought suit against a project owner (North Development) and the prime contractor (Southern Erection) seeking sums due for services rendered under a construction subcontract. McClure also sought a personal judgment against the owner and contractor pursuant to the Private Works Act, as well as recognition of his privilege in the property. The owner (North Development) claimed that McClure had agreed to waive his right to file a lien. Although the contract sued upon was in writing, there was a disagreement as to the work scope and method of payment. The court found that there was "*no meeting of the minds as to the cause or consideration for the contract*" which vitiated consent. Nevertheless, judgment was rendered in the subcontractor's favor for the unpaid price of his work. Further, the court did *not* enforce the alleged "lien waiver," but allowed the subcontractor to maintain its *in personam* claim against the owner as well as his *privilege* in the property.[16]

The writer is not aware of any Louisiana case in which one party was permitted to enforce a lien waiver in a circumstance where the consideration therefor had failed or was non-existent. Rather, Louisiana courts have noted that *releases* – including lien waivers – require "consideration,"

---

[16] The court noted that "*the invalidation of the written contract because of error renders the provisions thereof relating to waiver of lien rights and the hold harmless agreement by McClure ineffective.*"

and are unenforceable if consideration is absent or later fails. *See*, for example, *Quality Environmental Contractors, Inc. v. IT Corporation*, 1999 WL 1276829 (E.D.La.) and the cases cited therein.

* * *

NO. 02-30183

FIFTH CIRCUIT

COURT OF APPEAL

SHAW CONSTRUCTORS,

Plaintiff-Appellant-Cross-Appellee

versus

ICF KAISER ENGINEERS, INC., ET AL.

Defendants

PCS NITROGEN FERTILIZER, L.P., ET AL

Defendant-Appellee-Cross-Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

AMICUS CURIAE BRIEF OF LOUISIANA CHEMICAL ASSOCIATION AND LOUISIANA PULP AND PAPER ASSOCIATION IN SUPPORT OF PETITION FOR REHEARING OF PCS NITROGEN FERTILIZER, L.P., APPELLEE-CROSS-APPELLANT

H. Bruce Shreves, T.A. (12040)
James A. Burton (03708)
J. Thomas Hamrick, Jr. (16957)
Simon, Peragine, Smith &
Redfearn, L.L.P.
1100 Poydras St., 30th Floor
New Orleans, LA 70163-3000
Telephone: (504) 569-2030

Attorneys for Louisiana Chemical Association and Louisiana Pulp and Paper Association

* * *

II.

ARGUMENT

* * *

Moreover, the way in which the Panel resolved this case poses more fundamental questions concerning the right of private parties to enter into contracts and to govern the economic relationships among themselves. Indeed, the implications of the Panel's overly broad holding could be staggering for associations such as the LCA and the LPPA and their members.

* * *

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Supreme Court, U.S.
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No. 04-1542

IN THE

Supreme Court of the United States

PCS NITROGEN FERTILIZER, L.P.,

Petitioner,

v.

SHAW CONSTRUCTORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

ERIC A. KRACHT
Counsel of Record
SCOTT E. FRAZIER
KRACHT & FRAZIER, L.L.P.
5149 Bluebonnet Boulevard
Baton Rouge, LA 70809
(225) 293-4568

Counsel for Respondent

195749

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Shaw Constructors, Inc. f/k/a United Crafts, Inc. ("Shaw") is a wholly-owned subsidiary of The Shaw Group Inc., a publicly-held company.

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INTRODUCTION

In a unanimous decision authored by a former associate justice of the Louisiana Supreme Court, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") properly applied the substantive law of Louisiana, consistent with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny. In rendering its decision, the Fifth Circuit properly looked to controlling state legislation and decisions by state courts, and employed the "civilian methodology" to decide the issues presented in the way that the Louisiana Supreme Court would most likely have decided them.[1]

Petitioner PCS Nitrogen Fertilizer, L.P. ("PCS") seeks to pit the *Erie Doctrine* and *stare decisis* against Louisiana's *Civil Law system,* under which legislation is viewed as the superior source of law, *jurisprudence constante* is considered only as persuasive authority (but is not the law), and whose courts are not bound by *stare decisis*. PCS attempts to posit a conflict (albeit a false one) between Louisiana's "civilian methodology" for determining state law (under which legislation is deemed the primary source of law) and this Court's decision in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940), wherein the decision of a New Jersey intermediate court was held to be superior to a conflicting state statute.

Even if the *Fidelity Union Trust* decision created a tension with Louisiana's civilian methodology (which, for the reasons noted below, it does not) review of the Fifth Circuit's decision is

[1] Indeed, one would be hard-pressed to find a jurist more qualified than Judge Dennis to make an "Erie guess" of how the Louisiana Supreme Court would decide a case.

unwarranted in this case because (1) there is no state court decision which conflicts with the Louisiana statutes at issue; and (2) the Fifth Circuit applied the relevant Louisiana statutes as written. Moreover, the Fifth Circuit's decision followed the controlling precedents of Louisiana's highest court and, contrary to PCS's assertion, is not in conflict with a "long line of state court cases." Thus, the issue framed by PCS is more suitable for a law school examination than for a petition for certiorari to this Court.

STATEMENT OF THE CASE

This case involves the interpretation and application of the Louisiana Private Works Act, La. R.S. 9:4801, *et seq.* ("LPWA") and articles of Louisiana's Civil Code related to the dissolution of contracts.

On September 17, 1997, PCS (as owner) entered into a $38 million contract with ICF Kaiser Engineering, Inc. ("Kaiser") under which Kaiser was to design and construct a project called the *1265 STPD Nitric Acid Facility*. The work was to be performed at PCS's industrial plant near Geismar, Louisiana.

In January of 1998, Kaiser subcontracted a portion of its work to Shaw, pursuant to a written contract. The Kaiser/Shaw subcontract included a clause entitled *Waiver of Liens*, reprinted in the *Appendix to Petition for Certiorari* ("Pet. App.") at 82, which stated "*Subcontractor hereby agrees to and does waive his right to file any mechanic's liens or claims of any sort or kind against Owner's premises or any part thereof.*" That clause further required the subcontractor (Shaw) to execute a separate "Release and Waiver of Lien" form (reprinted at Pet. App. 92) which purported to effect a waiver of lien rights only "upon payment" of the sum set forth therein. Kaiser did not require and Shaw did not sign the latter "Release and Waiver of Lien" form.

Shaw completed all the Subcontract work on or about February 1, 2000. However, due to its own internal financial problems, Kaiser defaulted on the subcontract and failed to pay Shaw the sums due. Accordingly, Shaw timely and properly filed and recorded *statements of claim and privilege* ("liens"), asserting its unpaid debt (approximately $5 million). Kaiser never invoked the "lien waiver" or demanded that Shaw cancel its liens.

On February 23, 1999, Shaw filed suit against PCS and Kaiser in Louisiana state court. PCS and Kaiser subsequently removed the case to the United States District Court for the Middle District of Louisiana. The parties consented to adjudication before a Magistrate Judge.

Kaiser filed an *Answer and Confession of Judgment* in which it admitted all of the allegations of Shaw's petition. Therein, Kaiser judicially confessed *inter alia* its default under the Subcontract, its debt to Shaw, and the validity of Shaw's liens.

Following Kaiser's default, Shaw and Kaiser entered into an agreement styled "Compromise Agreement" under which Kaiser acknowledged and agreed that it owed Shaw $5,238,217.90, which would be paid in 20 monthly installments of $291,012.11 each. Kaiser also agreed that Shaw's liens would be subject to cancellation as follows: (1) Kaiser could file a bond or other security in conformity with the requirements of the *Act*; or (2) Kaiser could furnish to Shaw a letter of credit in a form acceptable to Shaw in the amount of $5,300,000. Kaiser and Shaw also agreed that Shaw would dismiss its claims and lawsuit against PCS *only if and when* Kaiser furnished replacement security to Shaw for its liens or when all of Kaiser's payment obligations to Shaw were satisfied. Kaiser never provided any replacement security.

Kaiser made partial payments to Shaw totaling $3,201,133.21, but thereafter defaulted, leaving an unpaid balance due Shaw of $2,037,084.77. On June 9, 2000, Kaiser filed for bankruptcy.

Shaw then sought to enforce its lien rights via partial summary judgment against PCS, who in turn filed a cross-motion for partial summary judgment seeking dismissal of all of Shaw's demands. The Magistrate Court ruled in PCS's favor, dismissing Shaw's claims and casting Shaw in damages for its failure to cancel its liens.

On appeal, the Fifth Circuit reversed the Magistrate Court's judgments and rendered on the issue of liability, "recognizing Shaw's right to enforce its claim and privilege against PCS personally and against PCS's property upon which Shaw's work was performed" Pet. App. 41. PCS applied for rehearing and rehearing *en banc*, which were denied.

Of particular relevance to the issues raised by PCS's petition are the Fifth Circuit's determinations that: (1) Kaiser's material breach (non-payment) gave rise to Shaw's right to dissolve the subcontract, which right of dissolution was not affected by the waiver of liens clause; (2) after the dissolution of the subcontract, the waiver of liens clause could not have any effect upon Shaw's ability to exercise its lien rights under the LPWA against PCS and its property; and (3) PCS is not entitled to enforce the lien waiver provision as if that clause were separate and independent from the other obligations arising from the (dissolved) subcontract. Pet. App. 21-22.

PCS's Petition suffers from multiple deficiencies, the most notable of which is the absence of on-point state court decisions that conflict with the Fifth Circuit's ruling. Moreover, the ruling

finds direct support in unambiguous state legislation and decisions by Louisiana's Supreme Court and intermediate courts. PCS's assertion that this case presents "an extreme departure" from protocol is unsupportable.

PERCEIVED MISSTATEMENTS OF FACT OR LAW

Pursuant to Supreme Court Rule 15.2, Shaw identifies the following misstatements of fact and law in PCS's *Petition for Writ of Certiorari* ("Pet.") that bear upon issues that properly would be before the Court if certiorari were granted:

1. "A long line of state court cases upholds contract provisions like the lien waiver involved in this case . . ." Pet. at 3.

2. "The court of appeals' decision creates a different *Erie* methodology for interpreting Louisiana law . . ." Pet. at 3.

3. ". . . it creates dual legal rules for limitation-of-remedies cases and will promote forum shopping." Pet. at 3.

4. "In the subcontract, Shaw provided an unequivocal lien waiver in favor of the owner . . ." Pet. at 4.

5. ". . . the court made it clear that it considered any case law unimportant in reaching its conclusion." Pet. at 6.

6. "In this case, the court of appeals indicated that it was not required to give deference to state court decisions and brushed aside or ignored on-point state court rulings." Pet. at 8.

7. "Thus the court of appeal authorized itself to engage in a broad discussion of Louisiana Civil Code principles and dismiss or ignore on-point case law." Pet. at 11.

8. "In effect, the court authorized itself to interpret Louisiana legislation *de novo*, without following the interpretation deemed appropriate by Louisiana courts in a long line of cases." Pet. at 11.

9. "The Louisiana state courts have held, without discord, that lien waivers are enforceable, and a Louisiana appellate court rejected the theory that contract 'dissolution' may abrogate a limitation-of-remedies clause." Pet. at 14.

10. "Louisiana courts may look to legislative principles rather than analogous case law *when there is no case law on a point*, but they do not look to legislative principles in lieu of applicable precedents." Pet. at 15.

11. "Moreover, the statutory 'dissolution' theory adopted by the Court of Appeals was rejected by a state intermediate court and review was denied by the Louisiana Supreme Court only two years ago." Pet. at 16.

12. "Additionally, the court of appeals' approach is out of step with the approaches used by other circuits in interpreting Civil Codes." Pet. at 16.

13. "The court of appeals adopted an interpretation of civil law principles that flatly conflicts with Louisiana case law." Pet. at 17.

14. "The theory that a material breach of contract permits dissolution under La. C.C. art. 2016 and obviates a promise to limit remedies conflicts with recent Louisiana jurisprudence that was not even addressed by the court of appeals." Pet. at 21.

REASONS FOR DENYING THE PETITION

The Fifth Circuit's ruling applied Louisiana Civil Code articles 2013-2018 (regarding dissolution of contracts) *as written* and is in accord with the Louisiana Supreme Court's decisions in *Sliman v. McBee*, 311 So.2d 248 (La. 1975) and *Robertson v. Buoni*, 504 So.2d 860 (La. 1987), as well as an intermediate state court's decision in *North Development Co., Inc. v. McClure*, 276 So.2d 395 (La. App. 2d Cir. 1973). The decision below does not violate *Erie*, does not conflict with any other decision of this Court, and properly interprets and applies the substantive law of Louisiana.

PCS charges the Fifth Circuit with violating *Erie* by utilizing a "different methodology" for determining state law in Louisiana. PCS argues that the Fifth Circuit ignored a "long line of on-point state court decisions" and adopted a "special civil law metho[d]" which conflicts with this Court's prescribed approach for ascertaining state law. Specifically, PCS asserts that the Fifth Circuit failed to enforce an "unequivocal lien waiver" in a manner consistent with state court rulings.

Contrary to PCS's argument, however, there is no "long line of on-point case law" supporting PCS's position. In fact, PCS has not cited a single case where a Louisiana court enforced a lien waiver clause in a dissolved contract. Further, the authorities cited by PCS do not support the enforcement of a lien waiver where there has been a failure of cause or consideration, or a material breach of a commutative contract which had the effect of voiding the contract *ab initio*.

A. The Fifth Circuit Did Not Depart From the *Erie* Protocol

The *Rules of Decision Act*, 28 U.S.C. § 1652, states:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in Civil actions in the courts of the United States, in cases where they apply.

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court held that in cases not governed by the Federal Constitution or by acts of Congress, the law of the state is to be applied, "[a]nd whether the law of the state shall be declared by its *Legislature in a statute* ***or*** by its *highest court in a decision* is *not a matter of federal concern* (emphasis added)." *Id.* at 78. The *Erie* Court held that the term "laws" included *both* state statutes and the so-called "common law" declared by the state's courts.

Subsequent to the *Erie* decision, the U.S. Supreme Court ruled that where a state's highest court had not declared the substantive law on a particular issue, a lower state court's decision on the issue could be considered by a federal court sitting in diversity as "datum" for the purpose of ascertaining the state law "unless it is convinced by other persuasive data that the highest court of the state would decide otherwise". *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237-38 61 S. Ct. 179, 183-84, 85 L. Ed. 139, 144-45 (1940).

In *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed 109 (1940), this Court reversed a decision of a Circuit Court of Appeals which, although recognizing

its duty to follow (New Jersey) state law, applied a state statute in a manner contrary to decisions by intermediate state courts which stood "as the *only exposition of the laws of the State* with respect to the construction and effect of the [subject] statutes . . ." (emphasis added) *Id.* at 179. This Court noted that it is "inadmissible that there should be one rule of state law for litigants in state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship." *Id.* at 180.

The Fifth Circuit's decision in the instant matter does not run afoul of the *Rules of Decision Act*, *Erie*, *West* or *Fidelity Union Trust*. Both the *Act* and *Erie* require federal courts to apply "the law of the state" but do not distinguish the state's *judicial decisions* from its *legislation* as sources of state law, nor do they favor intermediate state court case law over legislation. By expressly following a decision by Louisiana's highest court (*Sliman v. McBee*, supra.) and applying legislation *as written*, the Fifth Circuit did not transgress the rule established in *West*.

In an effort to conjure a conflict with *Fidelity Union Trust*, PCS asserts that the Fifth Circuit disregarded decisions by intermediate Louisiana (appellate) courts in reaching its decision. In reality, however, the Fifth Circuit was *not* confronted with a *Fidelity Union Trust* dilemma because it was able to find a basis for its ruling in unambiguous legislation (La. C.C. arts. 2013 *et seq.*) and a decision of the state's highest court. (*Sliman*, supra).[2] Therefore, it was not compelled to look to "other persuasive data" (e.g. the inapposite court cases cited by PCS).

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[2] Moreover, the dilemma confronted in *Fidelity Union Trust* (i.e. "conflict" between the literal interpretation of a state statute and a contrary interpretation by an intermediate state court) would never exist in Louisiana, because both its Legislature and Supreme Court have declared that *legislation* is the superior source of law and statutory enactments must be applied *as written*. *See* Section B.1., below.

It is manifestly evident, from even a cursory review of the Fifth Circuit's opinion, that it did not "create a different *Erie* methodology for interpreting Louisiana law." The Fifth Circuit's opinion accurately recites the principle that in Louisiana the primary source of law is legislation "and not (as in the common law) a great body of tradition in the form of prior decisions of the courts. . . ." Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 La. L.Rev. 727-728 (1962).

The Fifth Circuit's adoption of a civil law method for deciding the case is not "out of step" with other circuits which have interpreted civilian codes.[3] The legitimacy of "civil law methods" has been universally recognized. *See* Stephen G. Breyer, *The Relationship Between the Federal Courts and the Puerto Rico Legal System*, 53 Rev. Jur. U.P.R. 307, 310 (1984). Civilian jurisdictions look to legislation as the basis of private law. This is to be contrasted with common law states, such as California, which views its civil code as a mere supplement to a much more expansive body of law articulated in judicial decisions. *See* Alvin B. Rubin, *Hazards of a Civilian Venturer in Federal Court: Travel and Traveler on the Erie Railroad*, 148 La. L. Rev. 1369 (1988).

The Fifth Circuit's ruling does *not* "*create a different rule of law in federal diversity cases than exists in state courts*" Pet. at 23. The Fifth Circuit's approach is entirely consistent with the civilian methodology and interpretive principles laid down by the Louisiana Supreme Court in *Willis-Knighton Medical Center v. Caddo Shreveport Sales and Use Tax*, 903 So. 2d 1071, 2005 WL 737481 (La.), 2004-0473 (La. 4/1/05),

[3] Louisiana's civilian methodology of looking to *legislation* as the primary source of law does not require a federal court, sitting in diversity and applying the law of Louisiana, to totally disregard state court rulings — and the Fifth Circuit did not do so in this case.

discussed infra, which held that state courts are bound to recognize the superiority of legislation over jurisprudence and apply unambiguous statutes *as written*. Clearly, however, adoption of the unorthodox approach advocated by PCS could bring about the "inadmissible" result proscribed by *Fidelity Union Trust*, supra, in that a federal court would be bound to decide a case under a methodology inconsistent with Louisiana Supreme Court standards.

B. The Fifth Circuit Did Not Disregard Louisiana Law

PCS's petition sharply criticizes the Fifth Circuit's "*adopt[ion] of the so-called 'civil law metho[d] for resolving cases*" and denigrates the civilian methodology *in general* and *as applied* by the Fifth Circuit. Pet. at 3, 8, 11, 14. As noted above, the legitimacy of "civil law methods" has been universally recognized. PCS further argues that the Louisiana Supreme Court might apply some *different* method of analysis, and suggests that the state's high court would favor intermediate court decisions over a literal application of Louisiana Civil Code articles (particularly Articles 2013-2018 regarding the dissolution of contracts). On this issue, PCS is dead wrong.

As noted throughout this *Opposition*, the Fifth Circuit did in fact follow the controlling precedent of Louisiana's highest court with respect to the applicable substantive law, and therefore its consideration of lower court opinions (particularly those cited by PCS) was unnecessary. Further, and to the extent that the case required an "*Erie* guess" as to substantive law, the Fifth Circuit properly employed the civilian methodology as it has done over the course of many years in prior diversity cases. See for example, *American International Specialty Lines Insurance Company v. Canal Indemnity Company*, 352 F.3d 254, 260-261, C.A. 5 (La.) 2003, citing *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 197 C.A. 5 (La.) 2003.

1. *The Fifth Circuit Properly Applied Louisiana's "Civilian Methodology"*

In April of 2005, the Louisiana Supreme Court published its opinion in *Willis-Knighton Medical Center v. Caddo Shreveport Sales and Use Tax*, 903 So. 2d 1071, 2005 WL 737481 (La.), 2004-0473 (La. 4/1/05). The high court's central focus was the proper interpretation of a Louisiana Civil Code Article (Art. 466), particularly in the context of the diametrically opposed federal court decisions of *Equibank v. United States Internal Revenue Service*, 749 F.2d 1176 (5th Cir. 1985) and *Prytania Park Hotel, Ltd. v. General Star Indemnity Co.*, 179 F.3d 169 (5th Cir. 1999) which, the court noted, had "spawned a civilian cause-celebre". At the heart of the controversy was the extent to which certain jurisprudence which pre-dated the 1978 revision of the Civil Code's property law articles was relevant to the interpretation of Article 466 under the "civilian methodology."

In its analysis, the Louisiana Supreme Court referred to *Prytania Park* as a "landmark decision" and praised the U.S. Fifth Circuit for its repudiation of prior case law in favor of a literal interpretation of Civil Code Article 466 (consistent with proper civilian methodology). In an instructive discourse on the superiority of legislation over jurisprudence in Louisiana, and the requirement that Civil Code articles must be applied *as written*, the Louisiana Supreme Court stated:

> "First, civilian methodology and the civil code instruct that the sources of law are legislation and custom, and that legislation is the superior source of law. *LSA-C.C. arts. 1, 3.* Legislation, which is defined as the solemn expression of legislative will, *LSA-C.C. art. 2*, is to be interpreted according to the rules set forth

> in the Civil Code. Chief among those rules is the admonition in *LSA-C.C. art. 9* that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." Additionally, LSA-C.C. art. 11 instructs that "[t]he words of a law must be given their generally prevailing meaning." Thus, we begin, as we must, with the words of the law. *Dumas v. State, Department of Culture, Recreation & Tourism*, 2002-0563, p. 11 (La.10/15/02), 828 So.2d 530, 536." *Willis-Knighton, supra*, 903 So. 2d at 1085.

In *Willis-Knighton*, the Louisiana Supreme Court noted that the chief impediment to adopting an interpretation of Article 466 consistent with *Prytania Park* was "the body of *intermediate state court jurisprudence* that had developed in the wake of *Equibank*." The court overcame that obstacle by confirming that such jurisprudence is inferior to legislation, which must be applied as written:

> 'Reliance on *jurisprudence constante*, however, is misplaced as will be noted *infra*. Furthermore, we are a civilian jurisdiction in which legislation, the solemn expression of the legislative will, is the superior source of law. LSA-C.C. art. 2. *Jurisprudence constante* carries "considerable persuasive authority," *Doerr v. Mobil Oil Corp.*, 00-0947, p. 14 (La.12/19/00), 774 So.2d 119, 128, but is not the law." *Id* at 1087, 1088.

* * *

> "In Louisiana, legislation is superior to any other source of law. LSA-C.C. art. 2. We apply legislative provisions as written because this court cannot and should not ignore the plain expression of legislative will evidenced in the clear and unambiguous words of LSA-C.C. art. 466." *Willis-Knighton, supra*, at 1092.

Many of PCS's representations of "Louisiana law" stand in diametric opposition to the principles clearly set forth in *Willis-Knighton*. For example, PCS's Petition states (Pet. at 15) that: "Louisiana courts may look to legislative principles rather than analogous case law *when there is no case law on a point, but they do not look to legislative principles in lieu of applicable precedents*" (*emphasis* added). On that point, PCS could not be more wrong. It is impossible to square PCS's arguments with *Willis-Knighton*.

Shaw submits that the Fifth Circuit properly applied Louisiana's civil law methodology. The Fifth Circuit properly applied Civil Code articles *as written*, properly distinguished and dismissed intermediate state court decisions, and respected the decisions of the Louisiana Supreme Court, notably *Sliman v. McBee*, 311 So.2d 248 (La. 1975), discussed infra.

2. *The Fifth Circuit Followed State Law Governing Dissolution of Contracts*

The Fifth Circuit enforced the "strong right to dissolution" which is a well-established civilian remedy, deeply rooted in the Louisiana Civil Code (particularly Articles 2013-2018 and their source articles), Pet. App. at 20-22. Louisiana Civil Code Article 2013 provides that "*[w]hen the obligor fails to perform, the obligee has a right to the judicial* ***dissolution*** *of the contract*

or, according to the circumstances, to regard the contract as ***dissolved.***" Pet. App. 20, fn 41. Similarly, Article 2016 provides, in pertinent part, that "*when it is evident that the obligor will not perform, the obligee may regard the contract as* ***dissolved*** *without any notice to the obligor.*" Pet. App. 69. The right of contract dissolution, as established by Louisiana's legislature, is routinely enforced by Louisiana's Supreme Court and appellate courts.

In the leading case of *Sliman v. McBee*, 311 So.2d 248 (La. 1975) – cited in the Fifth Circuit's opinion Pet. App. at 18-20 – the plaintiff had executed an act of sale in which she agreed that "no lien shall exist on the lots here sold" to secure payment of notes given by the defendants as part of the purchase price. When the defendant defaulted in payment, the plaintiff brought suit for dissolution of the sale. The Louisiana Supreme Court held that a "dissolving, or resolutory, condition is implied in all commutative contracts and takes effect upon the failure of either party to comply with his engagement and the demand for dissolution by the aggrieved party."

Applying *Sliman*, the Fifth Circuit determined that the subcontract provision by which Shaw "agrees to and does waive its right to file any mechanics' lien or claims" against PCS's property did not constitute a waiver of Shaw's right to dissolve the contract. That holding is fully consistent with *Sliman*, in which the Louisiana Supreme Court held that the plaintiff's waiver of lien rights (vendor's lien) did not effect a waiver of her right to dissolve the contract of sale.[4]

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[4] Although the Fifth Circuit did not cite the more recent decision of the Louisiana Supreme Court in *Robertson v. Buoni*, supra, the high court again expressly followed *Sliman* in dissolving a contract of sale of immovable property, notwithstanding the fact that the seller had waived vendor's lien.

The Fifth Circuit's opinion is also consistent with a Louisiana appellate court's decision in *North Development Co., Inc. v. McClure*, 276 So.2d 395 (La. App. 2d Cir. 1973), wherein the court held that a subcontractor's contractual "waiver of lien rights" under the LPWA did not survive the dissolution of the contract. In *North Development*, a subcontractor (McClure) brought suit against a project owner and the prime contractor seeking sums due under a construction subcontract and recognition of his lien rights under the LPWA. The owner defended on the grounds that the subcontractor had waived his lien rights as one of the terms of the subcontract. However, when the court dissolved the contract (on a finding that there was "no meeting of the minds") the court also refused to enforce the lien waiver. Instead, the court recognized and enforced the subcontractor's lien rights under the LPWA. The court noted that "the invalidation of the written contract because of error renders the provisions thereof relating to waiver of lien rights . . . by [the subcontractor] ineffective." *Id.* at 400.

It is quite revealing that PCS's *Petition* makes no reference to the highly-relevant *Sliman*, *Robertson* or *North Development* cases. These cases stand for the proposition that Louisiana contracts are subject to dissolution, notwithstanding a contractual lien waiver therein, and that the lien waiver will not survive the dissolution of the contract.

C. The Fifth Circuit's Ruling Does Not Conflict With Any Controlling State Court Decisions

1. *PCS Misstates Louisiana Law Regarding Lien Waivers*

PCS inaccurately asserts that the Fifth Circuit adopted an interpretation of civil law principles that "flatly conflicts with Louisiana case law." In support of this contention, PCS cites a number of Louisiana cases which, for the reasons noted in more detail below, are readily distinguishable or otherwise inapplicable.

Shaw does not dispute the premise that Louisiana courts have enforced "lien waivers" that were executed in exchange for contemporaneous payment, alternative security or other consideration. However, that factual scenario does not exist in this case. Shaw disputes PCS's contention that any Louisiana court has ever enforced a lien waiver in a factual circumstance similar to the instant case. PCS has not cited any case in which a court enforced a contractual lien waiver in the context of a failure of consideration or material breach. None of the cases cited by PCS support the contention that a lien waiver, included as a term of a contract, will survive dissolution of the contract.

2. *The Cases Cited By PCS Are Distinguishable*

Toomer v. Price, 122 So. 856 (La. 1929), cited by PCS, is readily distinguishable on its facts and holding, in that it did not involve a dissolution of a contract or material breach of any agreement involving a lien waiver. In *Toomer*, a material supplier (Louisiana Western Lumber Company) and the contractor (Mr. Price) approached a surety for the purpose of obtaining a $10,000 bond for a construction project. As "*an inducement to furnish the bond*" the lumber company agreed that it would

not record a lien for the lumber to be furnished. On the basis of the lumber company's inducement and assurance, the surety issued the bond and the project went forward. When the contractor failed to pay the lumber company, it filed a lien. The court did not permit the material supplier to enforce its lien to the prejudice of the surety, who had fulfilled its promise to furnish the bond.

In *Toomer,* the court found that the lumber company received *consideration* for its agreement not to file a lien, which consideration was expressed in the guaranty letter: "*Trusting that this assurance [not to file a material lien on the job] will enable you to make the bond for [the contractor] Mr. Price . . .*" There was no failure of that consideration, and the surety (with whom the lien claimant had directly contracted for the "waiver") fully performed its obligations and did *not* default on its agreement. Both the facts and holding of *Toomer* are distinguishable and therefore cannot be said to conflict with the Fifth Circuit's ruling in the instant case.[5]

Executive Office Centers, Inc. v. Cournoyer, 433 So.2d 324 (La. App. 4th Cir. 1983), is cited as support for the general proposition that Louisiana law recognizes the validity of lien waivers (a proposition which is not in dispute). The case involved a mortgage foreclosure and an injunction to arrest it. The plaintiff claimed that the defendant had breached a provision in the subject mortgage which prohibited defendant from entering into a contract "*whereby any lien, privilege, mortgage or other encumbrance in favor of anyone furnishing labor or material may be*

[5] Although *Toomer* was decided by the Louisiana Supreme Court, the case is quite old and did not apply the current version of the LPWA. To the extent that *Toomer* might be perceived to be inconsistent with the Supreme Court's more recent holdings in *Sliman* and *Robertson, supra*, Toomer should be deemed overruled.

recorded against the property." The court found that no breach of the mortgage had occurred because the defendant produced evidence of documents "*which expressly waived any right to lien the property*."

Significantly, *Executive Office Centers* did not address the validity or enforceability of a lien waiver in the context of a breached agreement or failed consideration, nor did the court address whether a lien waiver would survive the dissolution of a contract, nor did the case address the right of a third-party beneficiary to enforce a lien waiver. Thus, it cannot be said that *Executive Office Centers* conflicts with the Fifth Circuit's ruling in the instant case.

Neither *Babineaux v. Grisaffi* 180 So.2d 888 (La. App. 3rd Cir. 1965), *reh. den.* nor *Wardlaw Bros. Garage, Inc. v. Thomas* 141 So. 108 (La. App. 2nd Cir. 1932) addressed liens arising under the LPWA. Rather, both cases dealt with repairmen's liens (created by a different statute) arising out of work performed on *automobiles* pursuant to oral agreements. Based upon unique and distinguishable facts, the courts found that the repairmen's liens were lost "by implication." Notably, the holdings of *Babineaux* and *Wardlaw* have been criticized ("*. . . it is somewhat difficult to square these cases with certain other applicable principles of law . . .*") and distinguished by another Louisiana appellate court, which refused to apply them. *Universal Elec. Const. Co. v. Liner*, 281 So.2d 830, 834 (La. App. 1st Cir. 1973). The Fifth Circuit similarly distinguished *Babineaux* and *Wardlaw* and properly refused to apply them (Pet. App. 27-28, fn 57).

Hero & Company v. Farnsworth & Chambers Co., Inc., 107 So.2d 650, (La. 1958), *reh. den.*, cited by PCS, stands for the proposition that a lien cannot be enforced if the underlying

debt has been discharged by performance. The case is readily distinguishable on both its facts and holding.

In *Hero*, the plaintiff ("Valley") was a material supplier to a subcontractor ("Loup & Younger"). Valley made an agreement with the contractor ("Farnsworth") to waive its "material lien privilege" on the condition that Farnsworth issue "joint checks" to Valley and Loup & Younger. Valley later filed a lien, claiming that it did not receive full payment through the joint check arrangement. The trial court held that Farnsworth had breached the subcontract, and therefore Valley was justified in recording its lien, notwithstanding its agreement not to do so. The Louisiana Supreme Court *reversed*, finding that Farnsworth had "*discharged its obligation [to Valley] properly by putting within the control of plaintiff [Valley] sufficient funds out of which it could have been completely paid.*" The court found that Valley's claim for a materialman's lien was defeated *not* by the "waiver" but rather because *the debt to Valley had been discharged by Farnsworth's performance.* As a matter of law and logic, there could be no *lien* if there is no *debt*. The Fifth Circuit properly distinguished *Hero* Pet. App. 27-28, fn 57, which clearly is not in conflict with its ruling in the instant case.

At paragraph 12 of its Petition, PCS argues: "The theory that a material breach of contract permits dissolution under La. C. C. art. 2016 and obviates a promise to limit remedies conflicts with recent Louisiana jurisprudence that was not even addressed by the [Fifth Circuit]" Pet. at 21-22. In support, PCS cites *Mobile Exploration & Producing U.S., Inc. v. Certain Underwriters*, No. 2001-2219; 837 So.2d 11, La. App. 1 Cir. 2002; *writ denied*, 2003-0418, 841 So.2d 805, (La. 2003).[6]

[6] PCS attempts to make much of the fact that the Louisiana Supreme Court denied review of the *Mobil Exploration* decision (Cont'd)

In *Mobil Exploration*, neither the trial court nor the appellate court granted dissolution of the subject contract. Rather, the court found that a valid contract had been entered into and had been breached; the court awarded damages for breach. The appellate court found that the lower court had erred in its application of La. C.C. art. 2016, as the contract had not been dissolved. *Mobile Exploration* does *not* support PCS's arguments that a contract may not be dissolved on account of a material breach, or that a lien waiver clause would survive contract dissolution or that article 2016 is not to be enforced as written. In light of the clear language of Article 2016, and the Louisiana Supreme Court's decisions in *Willis-Knighton*, *supra*, *Sliman*, *supra*, and *Robertson*, *supra*, PCS's reliance upon *Mobil Exploration* is sorely misplaced.

In sum, none of the "conflicting" Louisiana cases cited by PCS address the survival of a lien waiver when the underlying contract has been dissolved. None of the cases address the enforcement of a "lien waiver" by a third-party beneficiary in the context of a defaulted contract or failed consideration. The cited cases do *not* support PCS's contention that the Fifth Circuit's ruling in the instant case is in direct conflict with authoritative on-point Louisiana case law.

(Cont'd)

only two years ago. It is a well-settled proposition of Louisiana law that the Louisiana Supreme Court's denial of a writ has no precedential value. *See St. Tammany Manor, Inc. v. Spartan Bldg. Corp.*, 509 So.2d 424 (La.1987) and *Pitre v. La. Tech Univ.*, 95-1466 (La.5/10/96) 673 So.2d 585. In a recent opinion dated June 29, 2005, the Louisiana repeated the maxim that "*The denial of a writ in this Court has no precedential value and should in no way be construed as an adoption of a court of appeal's ruling or reasoning.*" *Long v. State of Louisiana, Dept. of Transportation*, 2005 WL 1527757 (La.), 2004-0485 (La. 6/29/05) __ So. 2d __.

CONCLUSION

After making a thorough examination of state legislation and judicial decisions, and applying the method of analysis prescribed by the Louisiana Supreme Court, the Fifth Circuit properly interpreted and applied Louisiana law to this case. The Fifth Circuit faithfully discharged its duty under *Erie*.

For all of the foregoing reasons, PCS's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ERIC A. KRACHT
Counsel of Record
SCOTT E. FRAZIER
KRACHT & FRAZIER, L.L.P.
5149 Bluebonnet Boulevard
Baton Rouge, LA 70809
(225) 293-4568

Counsel for Respondent

(2)

No. 04-1542

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In The

Supreme Court of the United States

PCS NITROGEN FERTILIZER, L.P.,

Petitioner,

versus

SHAW CONSTRUCTORS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

EUGENE R. PREAUS
EDWARD C. GLEASON
PREAUS, RODDY & ASSOCIATES, L.L.P.
650 Poydras Street – Suite 1650
New Orleans, Louisiana 70130
Telephone: (504) 523-2111

MICHAEL R. FONTHAM
Counsel of Record
JASON M. BILBE
SARAH H. BARCELLONA
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Petitioner, PCS Nitrogen Fertilizer, L.P.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

1. In opposing the Petition for a Writ of Certiorari of PCS Nitrogen Fertilizer, L.P. ("PCS"), Shaw Constructors, Inc. ("Shaw") offers alternative positions. First, Shaw asserts that a federal court may make its own interpretation of a Louisiana Civil Code provision, even if it conflicts with state court interpretations, without violating the *Erie* doctrine. [Opp. at 10-14]. Second, it asserts that the United States Court of Appeals for the Fifth Circuit ("court of appeals") followed Louisiana case law in holding that Shaw could dissolve its subcontract with ICF Kaiser Engineering, Inc. ("Kaiser") and abrogate the lien waiver Shaw provided in favor of PCS. [*Id.* at 14-21]. But Shaw misrepresents the Louisiana cases; in fact, all the relevant cases conflict with the court of appeals' decision. Shaw's opposition thus must rise or fall on its argument that the court of appeals, employing a "civilian" methodology, could disregard state cases in interpreting state law. Shaw correctly asserts that the Louisiana Supreme Court could take this action, but it provides no support for the proposition that *Erie* permits a federal court to do so.

2. Shaw relies on a recent Louisiana Supreme Court decision, *Willis-Knighton Medical Center v. Caddo Shreveport Sales and Use Tax*, 2004-0473 (La. 4/1/05); 903 So. 2d 1071, 2005 WL 737481, as upholding and providing "an instructive discourse" on the "superiority of legislation over jurisprudence in Louisiana." [Opp. at 12]. But in that case, the Louisiana Supreme Court merely recognized that an *intervening statute* may, when it is unambiguous, overrule prior conflicting case law. The court held that cases interpreting Louisiana Civil Code provisions that had been repealed, and replaced with articles that were intended to change the law, should not be followed if the

case law conflicted with the new provisions. *Id.* at 1086-87. As the court held, "the content of former Articles 467, 468 and 469 is irreconcilable with that of the new articles." *Id.* at 1086. It concluded: "[W]hile former Article 469 and its jurisprudential gloss remain relevant, former Articles 467 and 468 have been repealed by implication and thus, their judicial interpretations are not relevant." *Id.* at 1087. This analytical approach should not be surprising even to a common law jurist, because the result would be the same in the common law. In this case, in contrast to *Willis-Knighton*, the revised Civil Code articles relied on by the court of appeals were not intended to change the law. Revision Comments, La. C.C. arts. 2013-16 (Comments indicate each article "does not change the law. . . .").

3. In any event, this case does not involve the extent to which the Louisiana Supreme Court or another Louisiana court may set aside precedent in favor of its own interpretation of a state Civil Code provision. Instead, the issue is whether a federal court applying *Erie* may adopt its own interpretation of broad Civil Code articles and reject out of hand a line of state cases that conflicts with the federal court's interpretation. This approach permits the federal court to apply what it thinks the state law "should be," rather than what it is, in violation of *Erie*. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71, 58 S. Ct. 817, 819, 82 L. Ed. 1188, 1190 (1938). When state courts determine the law, they act as organs of the state, and federal courts are supposed to follow their decisions unless "more convincing evidence indicates the state law is different." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78, 61 S. Ct. 176, 178, 85 L. Ed. 109, 113 (1941). Here, the court of appeals' different opinion as to what the law should be, based on a theory never raised as a basis for

appeal, does not constitute the "evidence" that federalism requires for rejecting state case law.

4. Shaw contends that the court of appeals "did in fact follow the controlling precedent of Louisiana's highest court with respect to the applicable substantive law," *citing Sliman v. McBee*, 311 So. 2d 248 (La. 1975). [Opp. at 11, 15]. But Sliman actually conflicts with the court of appeals' holding, because it implicitly upheld the validity of a lien waiver. Indeed, the court of appeals did not rely on *Sliman* for the proposition that a party through contract dissolution may negate a lien waiver; instead, the court cited *Sliman* only for its holding that a lien waiver does not also implicitly waive the independent right of dissolution. [App. 18-19]. *Sliman* could not support the decision in this case, because the Louisiana Supreme Court let stand, and discussed with approval, a lower court ruling that prohibited Mrs. Sliman from enforcing the lien she had waived. 311 So. 2d at 250: "[F]inding that she had waived her right to a vendor's lien in the act of sale, the court refused to allow Mrs. Sliman a vendor's lien. . . . [That decision was affirmed and certiorari was denied]." *Id.* The court permitted Mrs. Sliman to exercise a contract remedy, but not to enforce the lien.

5. The *Sliman* decision illustrates the strained logic required to apply a "dissolution" theory to this case. In *Sliman*, the plaintiff *sued* for dissolution, employing one of the two accepted methods in Louisiana for dissolving a contract. La. C.C. arts. 2013-16; comment, La. C.C. art. 2013; *In re: Liljeberg Enterprises, Inc.*, 304 F.2d 410, 437-38 (5th Cir. 2002) (judicial dissolution or notice of dissolution required, except in limited circumstances). Here, Shaw never gave a notice of dissolution. It sued not to dissolve, but *to enforce*, the contract. Shaw never pleaded

dissolution in the district court. Shaw negotiated a compromise agreement with Kaiser *to enforce* the contract. Shaw did not mention dissolution in the appeal until it filed a reply brief, and it *never* claimed that it had dissolved the contract. The court of appeals imported the "dissolution" solution and the accompanying essay on civilian theory on its own, creating a plaintiff's right to dissolve a contract during an appeal of a suit the plaintiff brought to enforce the contract. [App. 14-22]. This unique approach has no grounding in Louisiana law.

6. Shaw has no credible distinction for *Mobil Exploration & Producing U.S. Inc. v. Certain Underwriters*, No. 2001-2219 (La. App. 1 Cir. 11/20/02); 837 So. 2d 11, *writ denied*, 2003-0418 (La. 4/21/03); 841 So. 2d 805, so it misrepresents the decision. Shaw says *Mobil Exploration* held that "the contract had not been dissolved," but that characterization is erroneous. [Opp. at 21]. *Mobil Exploration* upheld the trial court's determination that the contract was breached. 837 So. 2d at 29-30. The trial court also ruled that the breach permitted the non-breaching party to dissolve the contract and abrogate the limitation-of-remedies provision. *Id.* at 31. The state court of appeal reversed this ruling and specifically held that La. C.C. art. 2016, the provision Shaw relies on in this case, did not permit abrogating the provision limiting contract remedies. *Id.* The court said: "The trial court mischaracterizes the purpose of La. C.C. art. 2016, which is to relieve an obligee of any further performance when the obligor has failed to perform." *Id.* It concluded: "The fact that the contract was breached does not render inoperative the contractual provisions governing breach; otherwise that portion of the contract becomes meaningless." *Id.* Thus,

Mobile Exploration directly conflicts with the court of appeals' interpretation of the Civil Code provision.

7. Shaw cites *North Development Co., Inc. v. McClure*, 276 So. 2d 395 (La. App. 2d Cir. 1973), for the proposition that "a subcontractor's contractual 'waiver of lien rights' under the LPWA did not survive the dissolution of the contract." [Opp. at 16]. But that case did not involve "dissolution" at all; instead, the court held that no contact was ever formed because the subcontractor was not provided the correct specifications and there was no meeting of the minds. The court held: "It is thus apparent that there was a mutual error of fact in regard to the extent of the work to be performed and the payment to be received therefor which was the principal cause of the contract." *Id.* at 399. Since the subcontrator never entered a binding contract, its lien waiver contained in the contract could not be enforced. That case does not stand for the proposition that a party may abrogate a lien waiver by dissolving a contract.

8. Shaw's efforts to distinguish the many Louisiana cases that enforce lien waivers ignores a central truth – the only purpose of a lien waiver is to limit the waiving party's remedy for a breach of contract, specifically, the failure to pay the contract price. If the obligor performs, there is no need to enforce a lien, so a lien waiver can have no effect. Thus, contrary to Shaw's contention, *all the cases* cited by PCS involved or contemplated a "failure of consideration or material breach." [Opp. at 17]. *Toomer v. Price*, 122 So. 856 (La. 1929), involved nonpayment by the principal obligor, the same breach as Shaw alleges here. *Babineaux v. Grisaffi*, 180 So. 2d 888 (La. App. 3d Cir. 1965), and *Wardlaw Bros. Garage, Inc. v. Thomas*, 140 So.

108 (La. App. 2d Cir. 1932), also involved non-payment by the principal obligor. *Executive Office Centers, Inc. v. Cournoyer*, 433 So. 2d 324 (La. App. 4th Cir. 1983), held that lien waivers obtained by an owner protected a mortgage holder from the filing of liens against the mortgaged property in the event the owner failed to make payment on renovation contracts. The lien waivers could have an effect only if the owner breached the contracts, so the court's holding establishes that lien waivers are enforceable in the event of a breach. Shaw correctly points out that in *Hero & Co. v. Farnsworth & Chambers Co.*, 107 So. 2d 750 (La. 1958), the court held that sufficient two-party checks were provided the contractor to pay the subcontractor. Nevertheless, the subcontractor did not actually receive full payment, and the court enforced its waiver of a lien. Shaw can point to no Louisiana case that ever invalidated a lien waiver in a contract because the contract was breached or "dissolved" after the fact.

CONCLUSION

Unlike the Louisiana Supreme Court, the court of appeals was not authorized under *Erie* to employ its own view of the wisest interpretation of state law in place of a conflicting rule established in a line of state cases. The Louisiana state courts have determined that lien waivers are binding; the court of appeals disregarded these rulings in adopting its own interpretation of the Civil Code. This Court should grant a writ of certiorari to determine whether a federal court, in interpreting Louisiana law,

may apply the law as the court believes it "should be" rather than as state courts have declared it.

Respectfully submitted,

EUGENE R. PREAUS
EDWARD C. GLEASON
PREAUS, RODDY & ASSOCIATES, L.L.P.
650 Poydras Street – Suite 1650
New Orleans, Louisiana 70130
Telephone: (504) 523-2111

MICHAEL R. FONTHAM
Counsel of Record
JASON M. BILBE
SARAH H. BARCELLONA
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200